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**REPORTS**  
**OF**  
**CASES ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME JUDICIAL COURT**  
**OF**  
**MASSACHUSETTS.**

---

**BY**  
**CHARLES ALLEN.**

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**VOLUME XL**

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**JUDGES**  
**OF THE**  
**SUPREME JUDICIAL COURT**

**DURING THE TIME OF THESE REPORTS.**

**HON. GEORGE T. BIGELOW, CHIEF JUSTICE.**

**HON. CHARLES A. DEWEY.**

**HON. EBENEZER R. HOAR.**

**HON. REUBEN A. CHAPMAN.**

**HON. HORACE GRAY, JR.**

**HON. JAMES D. COLT.**

---

**ATTORNEY GENERAL,**  
**HON. CHESTER I. REED.**

2-23326





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**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME JUDICIAL COURT**  
**FOR THE**  
**COUNTY OF WORCESTER, OCTOBER TERM 1865,**  
**AT WORCESTER.**

---

**PRESENT :**

HON. GEORGE T. BIGELOW, CHIEF JUSTICE.	
HON. CHARLES A. DEWEY,	}
HON. REUBEN A. CHAPMAN,	
HON. HORACE GRAY, JR.,	
HON. JAMES D. COLT,	
	<b>JUSTICES.</b>

[CONTINUED FROM VOLUME X.]

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**THOMAS EARLE vs. ALICE C. EARLE.**

It is in a libel for divorce against a married woman on the ground of adultery, a servant has testified to seeing her on one occasion sitting in the lap of the man with whom the adultery is charged to have been committed, and he in reply testifies to facts showing that this was for an innocent purpose, and by the request of his wife, who had temporarily left the room, and she testifies to the same facts, they may be allowed to state, for the purpose of showing that they are referring to the same occasion, that on her return to the room, within two or three minutes, he remarked to her that the servant had been in.

**LIBEL** for divorce on the ground of adultery. At the trial in this court, before *Gray, J.*, and a jury, a verdict was returned for the libellee, and the libellant alleged exceptions, which are sufficiently stated in the opinion.

*D. Foster & T. L. Nelson*, for the libellant.

---

Earle v. Earle.

---

*B. F. Thomas & F. H. Dewey, (G. F. Hoar with them,) for the libellee.*

COLT, J. If the evidence objected to was admissible for any purpose the libellant has no ground of complaint, unless the judge refused at the trial to limit its effect, and permitted it to be used for a purpose for which it was not competent. In the absence of anything in the exceptions showing the contrary, it must be presumed that the proper limitation in the use of the evidence was given by the court. The objection to the evidence in this case was general; if it had been otherwise, and objection had been taken that the judge declined properly to limit the use of this evidence and permitted it for an improper purpose, the libellee might then have waived its use for any such purpose, and saved the risk of an exception. It is therefore right to conclude that evidence admissible for any purpose was either submitted to the jury with proper qualifications, or that the objecting party did not care to limit its effect, unless it appears affirmatively that such evidence was permitted under objection to be improperly used. *Salisbury v. Gourgas*, 10 Met. 442. *Holbrook v. Jackson*, 7 Cush. 154. *Waters v. Gilbert*, 2 Cush. 27.

The inquiry in this case then is whether the evidence objected to was admissible for any purpose. The libellant had called Ellen Gallagher, whose testimony if unexplained tended to establish the guilt of the libellee by showing improper intimacy with Elisha F. Rogers on one occasion when she saw them together in Mrs. Earle's bedroom, and Mrs. Earle sitting in the lap of Rogers. To meet this evidence, the libellee called Rogers and his wife. Mrs. Rogers stated in substance that on one occasion during the time charged she went with her husband to Mrs. Earle's bedroom when Mrs. Earle was confined to her bed with illness, and that Mr. Rogers at her request and to enable her to make the bed did at that time take Mrs. Earle into his lap; that she had occasion to go into an adjoining room for a few moments, and on her return the parties still remained in that position. Mr. Rogers stated to her that "Ellen had been in." Mr. Rogers also testified to this occurrence substantially as stated by his wife, and added that in his wife's absence from

the room Ellen Gallagher came to the door, and that he stated the fact to his wife on her return. To the admission of the statement of Rogers to his wife the libellant excepted.

It was important, as the case stood, for the libellee to satisfy the jury that Mr. and Mrs. Rogers were testifying to the same occasion. The testimony of Mrs. Rogers confirming that of her husband would certainly strengthen the claim that at that time there was nothing criminal in the conduct of the parties. Any circumstance or act occurring at that transaction and remembered by both witnesses would show that they were testifying to the same occasion, and would be clearly competent. So we are of opinion that the conversation of the parties or any declarations made at the time are to be regarded as in the nature of verbal acts, and admissible for the purpose of identifying the occasion of which the witnesses speak. Statements used for this limited purpose are admitted without regard to the truth of the fact stated. Whether in this case the occasion in question was in fact the time when Ellen Gallagher came to the door in Mrs. Rogers's absence would still stand before the jury upon the unaided testimony of Rogers. There was no violation of the rule against hearsay evidence, therefore, in admitting the statement of Rogers to his wife, as testified to by both. 1 Greenl. Ev. § 123.

It was urged that this evidence was admissible upon the further ground that, as the transaction which was the subject of investigation derived its significance mainly from the intent and disposition of the parties at the time, any conversation had or declaration made by the parties during its continuance was competent to go to the jury as part of the *res gestæ*, and as having a direct tendency, however slight, to show the temper of mind. Great latitude is sometimes allowed in the admission of evidence on this ground, and, if no other reason existed for sustaining the ruling of the presiding judge in this case, it might perhaps be supported solely on this ground. *Exceptions overruled.*



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James v. Bligh.

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## THOMAS T. JAMES vs. JOHN BLIGH.

A written receipt for money, showing that in consideration thereof the signer of it agreed to discharge a suit in court against the payer upon the latter's paying all legal costs therein, cannot be varied by proof that the oral agreement was that nothing should be paid for costs that would go to the attorney.

CONTRACT to recover eighty dollars, money had and received.

At the trial in the superior court, before *Brigham, J.*, it appeared that on the 13th of January 1862 an agreement was made between the parties for the settlement of two actions against the present plaintiff, one of which was in favor of the present defendant, and the other was for his benefit, though brought in the name of another person; and James paid to Bligh eighty dollars, taking from him the following receipt: "Providence, Jan. 13th 1862. \$80. Received of Thomas T James eighty dollars, for which I agree to discharge and have entered settled in court a suit which is now pending in court in Worcester County, Mass., against said Thomas T. James, after said James pays to my attorney, S. A. Burgess, all legal costs in said suit, meaning by this to settle all debts and demands I have against said James; also have the suit of James M. Curtis against said James entered settled, by James paying to you the legal costs on the same, as the eighty dollars were intended to settle that too. John Bligh." On the same day Bligh gave James an order upon Mr. Burgess to discharge the actions, upon payment by James of "all costs that attend it except your fees."

The plaintiff introduced evidence tending to show that he agreed to pay the eighty dollars and "only the taxable costs going to the court, and nothing that went to Bligh's attorney," and that Bligh agreed to this; but afterwards the attorney and Bligh refused to discharge the suits without payment of full costs, and Bligh also refused to repay the eighty dollars.

The judge directed the jury to return a verdict for the defendant, which was accordingly done; and the plaintiff alleged exceptions.

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Light v. Goddard.

---

*W. L. Southwick*, for the plaintiff.

*S. A. Burgess*, for the defendant.

GRAY, J. The paper called a receipt contained also a contract in writing, which was made binding on Bligh by his signature, and on James by being delivered to and accepted by him, and which shows that the consideration for Bligh's agreement to have the two suits then pending discharged was James's payment of eighty dollars and agreement to pay to Bligh's attorney "all legal costs" in those suits. In this aspect, it could no more be varied or controlled by oral evidence than any other written contract between the parties. *Brown v. Cambridge*, 3 Allen, 474. "All legal costs" in a suit clearly include charges for travel and attendance and other items that enure to the benefit of the attorney, as well as clerk's, officer's and witnesses' fees. If the order simultaneously delivered to James, signed by Bligh and addressed to his attorney, may be referred to in determining the construction of the contract contained in the receipt, it has no tendency to vary that construction, for its language — "he paying all costs that attend it except your fees" — is quite as consistent, to say the least, with including all taxable costs and omitting counsel fees which are not taxable, as with any other interpretation.

*Exceptions overruled.*

---

JOSEPH F. LIGHT vs. DORRANCE S. GODDARD.

If the granted premises in a deed are described simply by courses and distances, and without reference to visible monuments, except on one side, where they are bounded on a new open street, and are further described as being lots marked on a plan which is referred to, and on the plan it appears that a considerable number of lots are laid down on one side of the street, and on the opposite side the land is marked "Ornamental Grounds" and "Play Ground," without any designation of how much land is to be so appropriated, there is no implied covenant that any land on the opposite side of the street shall be so appropriated, although the grantor owned the same.

CONTRACT. The declaration alleged that the defendant conveyed to the plaintiff a parcel of land in Worcester, with covenants of warranty that the same was free from incumbrances ;

but that the same was not free from incumbrances, and the owner of land on the opposite side of the street and his heirs and assigns were entitled to have the plaintiff's land kept open as ornamental ground and play ground. The defendant denied that the granted premises were incumbered.

It was agreed in this court that in 1848 the Trustees of the Worcester Academy owned a large tract of land, through which there was a street called Benefit Street, and conveyed to James H. Wall a certain portion of the land on one side of this street by a deed in which the granted premises were described simply by courses and distances, the lines running to "corners," without reference to any visible monuments, except on one side where the premises were bounded on "a new open street three rods in width called Benefit Street." The deed further described the premises as "being the lots marked No. 1, No. 2, No. 5 and No. 6, on the plan on the back of this instrument," and conveyed the right of passing over and using Benefit Street. The plan showed that all the land on that side of the street was divided into lots, while that on the opposite side was not marked by division lines at all, but one portion was marked "Ornamental Grounds" and another "Play Ground." The land thus marked "Ornamental Grounds" and "Play Ground" afterwards came by mesne conveyances to the defendant, who conveyed the same to the plaintiff, as alleged in the declaration. The trustees assured Wall verbally that the land was to remain open as an ornamental ground and play ground; and he and some other persons owning land near by have aided in decorating the same with shade trees.

On these facts, judgment was rendered for the defendant, and the plaintiff appealed to the whole court.

*G. F. Hoar*, for the plaintiff. The reference to the plan in the deed amounted to a covenant that the state of things there represented should continue, so far as it was beneficial to the estate granted, and depended on the grantors. *Lewis Street*, 2 Wend. 472. *Livingston v. The Mayor, &c. of New York*, 8 Wend. 85. *Wyman v. The Mayor, &c. of New York* 11 Wend. 486. *Cincinnati v. White*, 6 Pet. 431. *Trustees of Watertown v*

*Cowen*, 4 Paige, 510. *Thirty-Second Street*, 19 Wend. 128. *Twenty-Ninth Street*, 1 Hill, 189. *Thirty-Ninth Street*, 1b. 191. *Parker v. Smith*, 17 Mass. 413. *O'Linda v. Lothrop*, 21 Pick. 292. *Parker v. Framingham*, 8 Met. 260. The designation of the premises on the plan as ornamental ground and play ground, the verbal statements, and suffering the neighbors to ornament the ground with trees, constitute evidence from which a dedication may be fairly inferred.

*F. H. Dewey*, for the defendant, cited *Lunt v. Holland*, 14 Mass. 149; *Davis v. Rainsford*, 17 Mass. 207; *Magoun v. Lap- ham*, 21 Pick. 135; *Hill v. Mowry*, 6 Gray, 551.

BIGELOW, C. J. The cases cited by the plaintiff, in which it has been held that a right, interest or easement in land, adjacent to that which is conveyed in fee by deed, may pass by way of estoppel under an implied covenant, go no further than to apply the doctrine to grants of land bounded on a road or street, so as to give to the grantee a right of way therein by implication. In these and similar cases it is regarded as a question of intent; and as ways or streets adjoining land, and by which it is bounded, are usually appurtenances, or used to obtain access to the land, the inference is a reasonable one that the grantor intended that the street or way named in the deed should continue open and be for the use of the grantee, so far as it might be beneficial to the estate granted, and was within the power of the grantor to convey.

An attempt is made in the present case to extend this rule of interpretation much further than is warranted by any of the adjudicated cases. The plaintiff claims under a deed which describes the lots conveyed as laid down on a plan to which reference is made. Upon inspection of this plan, it appears that these lots are carved out of a large tract of land, the whole of which is divided into numerous lots or parcels, and is fully laid down on said plan. It also appears that certain other land, which at the time of the grant in question also belonged to the grantors, and which is not immediately adjacent to the lots conveyed, but is separated therefrom by a contemplated street which forms one of the boundary lines of the lots conveyed, is

designated on the plan as "Ornamental Grounds" and as "Play Ground." The contention of the plaintiff is that such designation on the plan referred to in the deed of lands lying in the vicinity of, but not adjacent to, the land granted amounts to a covenant that those grounds shall forever continue to be appropriated and used for the uses and purposes so designated.

We are by no means prepared to adopt as a sound rule of exposition the general proposition on which the argument for the plaintiff rests. We do not think that a mere reference to a plan in the descriptive part of a deed carries with it by necessary implication an agreement or stipulation that the condition of land, not adjacent to, but lying in the vicinity of, that granted, as shown on the plan, or the use to which it is represented on the plan to be appropriated, shall forever continue the same so far as it may be indirectly beneficial to the land included in the deed, and was within the power or control of the grantor at the time of the grant. Certainly no case has been cited which supports so broad a doctrine. But, in the present case, it seems to us to be clear on the face of the deed that the grantors did not intend to convey any such right or privilege as that now asserted by the plaintiff. The lots granted are described by courses and distances only, or by abutments which were not apparent on the earth's surface at the time the deed was made, with the single exception of the line of Benefit Street. It was necessary, therefore, to refer to the plan in order to designate with accuracy the parcels intended to be conveyed. This purpose is sufficient to account for the reference to the plan, without seeking for other and more remote intentions of the grantor. Besides; the privileges and easements which were designed by the parties to the deed to be appurtenant to the land granted were not left to implication. The right to the use of Benefit Street, which would have passed by implication, that street being one of the boundaries of the land granted, was expressly conveyed by the deed, clearly indicating that the subject matter of the grant, and that which would be useful and beneficial to the enjoyment of the premises or properly appurtenant thereto, were in the minds of the parties, and were expressly defined and limited by the deed

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Nor, in seeking for the intention of the parties, is it to be overlooked that the words on the plan from which the plaintiff seeks to derive an implied covenant are of a very vague and indeterminate character, and that they leave wholly uncertain not only the limits or extent of the land in which a right or privilege is claimed for the grantee, but also the particular portion which is to be appropriated for each of the two purposes designated on the plan. It cannot be reasonably supposed that it was the intent of the parties to convey a right or enter into a covenant for the enjoyment of a privilege or easement which was left wholly undefined, and without any means of ascertaining, by reference to the terms of the grant, the extent of enjoyment to which the grantee and those claiming under him might be entitled.

*Judgment for the defendant*

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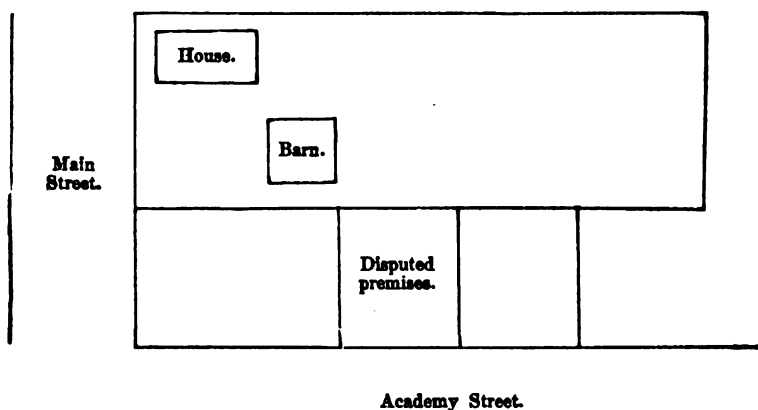
REBECCA S. PERKINS vs. GEORGE S. JEWETT.

Y the owner of a homestead purchases adjoining land which fronts upon another street, and never occupies it himself as a part of his homestead, or uses it in any manner in connection therewith, or takes down the fence which separates it therefrom, but for many years and until his death lets it to tenants, it will not pass under a devise of his house lot; although he bought it for the purpose of having a passage from the other street to the back part of his house lot, and repeatedly said that he bought it for his personal use and for the benefit of his house lot and in order to annex it thereto.

WRIT OF ENTRY. Plea, *nul disseisin*.

At the trial in the superior court, before Ames, J., it appeared that both parties claim the demanded premises under Francis Perkins, who died in August 1859, leaving a will dated April 7th 1853; the demandant, who is his widow, claiming under the following devise to her: "Also my dwelling-house, out-buildings and house lot constituting my homestead estate;" and the tenant claiming under the residuary devise. The following plan exhibits the situation of the premises:

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In 1825 the testator erected the house and barn upon the lot in which they are inclosed, as shown in the plan, and continued to live there with his wife until he died. In 1844 he purchased the lot fronting on Academy Street, conveyed away a portion of it, and kept the remainder, which is the lot now in dispute. This lot was separated from his homestead by a board fence which was not taken down in his lifetime. For a number of years after the purchase the testator allowed one of the neighbors to use this lot for a garden, but from 1853 until his death he let it for a wood-yard. The only access to the barn and back part of the homestead was originally from Main Street.

Evidence was offered tending to show that the testator bought the demanded premises for the purpose of having a passage from Academy Street to the back part of his homestead lot; that he repeatedly refused to sell the same, and said it was not for sale, but that he bought it for his own personal use and for the benefit of his front lot and to annex it thereto. Some of the demandant's witnesses testified that he said he bought it so as to control it, and to prevent its being occupied in such a way or by such persons as to incommode or annoy him in his homestead. The demandant herself testified that he bought it for an opening for his orchard and garden. It did not appear that he ever used it as a passage, or made any personal use of it, and



in fact it was not so used by him or any of his family. There was no evidence that he ever called it his homestead, or spoke of it as a part of his homestead.

The judge ruled that, assuming the facts of the case to be as stated by the demandant's witnesses and as claimed by her, and drawing all proper and legitimate inferences therefrom, the demandant was not entitled to recover; that the demanded premises were not contiguous to the dwelling-house, not united to the original homestead by removing the division fence, and not in any way used in connection therewith; that the only ground on which it could be considered as part of the homestead could be found in the purpose and object with which the testator made the purchase; and that an intention of making over it a passage way at some future time, and upon the contingency of its being wanted, (it appearing that that intention had never been carried into effect, and that contingency had not happened, and that no personal use had been made of the lot by the testator,) would not make the lot in question a part of the homestead, even though it was purchased for the purpose of securing the means of obtaining such a passage way. The judge therefore ruled that the demanded premises did not pass by the devise to the demandant, and directed a verdict for the tenant, which was rendered accordingly. The demandant alleged exceptions.

*D. S. Richardson & C. H. B. Snow*, for the demandant. The devise to the widow should be beneficially construed, and it would be a narrow construction to say that the testator meant that this lot should go into other hands, and his widow who took the homestead should be deprived of this which he for so many years considered essential to hold in connection with the dwelling-house. This holding by him, his repeated declarations of his object in so doing, and its relation to his other land sufficiently made it a part of his homestead estate; and the permission to others to occupy it for purposes not inconsistent therewith and the omission to take down the fence cannot be considered as showing an intention to devise it as an outlot. See *Thatcher v. Howland*, 2 Met. 45; *Taylor v. Mixter*, 11 Pick. 317; *Aldrich v. Gaskill*, 10 Cush. 157; *Allen v. Richards*, 5 Pick. 512;

*Smith v. Martin*, 2 Saund. 400, n.; *Winchester v. Hees*, 35 N. H. 43. If the court cannot see that the demanded premises pass to the demandant on the facts proved, the case should be submitted to a jury to determine other facts from the evidence, and particularly whether the premises are reasonably necessary for the convenient enjoyment or the beneficial use or disposal of the rest of the estate.

*N. Wood*, for the tenant, cited *Brown v. Saltonstall*, 3 Met 423; *Eliot v. Carter*, 12 Pick. 436; *Otis v. Smith*, 9 Pick. 293; *Buck v. Nurton*, 1 B. & P. 53; *Allen v. Richards*, 5 Pick. 512; *Jackson v. Moyer*, 13 Johns. 531; *Doe v. Collins*, 2 T. R. 498.

Dewey, J. The devise under which the demandant claims to hold the demanded premises is in these words: "Also my dwelling-house, outbuildings and house lot constituting my homestead estate." No other clause in the will gives us any aid in the construction of this devise. In deciding upon the particular parcel of land embraced in the devise, we are to refer to external objects and facts existing *aliunde*. If we find that there existed at the death of the testator a well defined homestead estate, known and used as such by him, and corresponding with the description given in the devise, and which exhausts the devise, such homestead passes under the will.

In the present instance, we do find that the testator as early as 1825 became the owner of a house lot, upon which he erected a house and outbuildings, and upon which he resided until his death in 1859. The application of this devise to these premises would present no difficulty. It would satisfy all calls of the devise, and give full effect to the words used. The case therefore requires no extended or doubtful construction or application of the will, to find a proper subject to which the devise may be applied. Such was the well known homestead of the testator up to the year 1844. In that year he purchased an adjoining piece of land in the rear of his house lot, fronting upon another street, and subsequently sold a part of it, and retained the residue; and the further inquiry is, whether this latter parcel is embraced in the devise to the demandant? It is adjoining the old homestead lot, but separated by a board fence, and has always

remained thus separated. It has not been used by the testator in connection with the old homestead, but occupied by tenants who paid rent therefor, and used it for a garden and a wood-yard.

The demandant's evidence tended to show that the testator bought this lot for the purpose of having a passage from Academy Street to the back of his other lot, his house fronting on Main Street. But it was admitted that he never used it as a passage, or made any use of it whatever by himself or his family. There was also evidence that he had refused to sell the lot, declaring that he bought it for the benefit of his front lot, and for his own convenience, and to annex to his home lot. But there was no evidence that he ever called it his homestead, or spoke of it as a part of his homestead.

In deciding whether this lot thus purchased in 1844 was in fact attached to the homestead, so as to be parcel thereof, the fact of unity of possession and actual occupation in common with the former estate have been regarded as the most decisive tests. When these have existed, great latitude of construction has been permitted, to carry out the supposed intention of the testator to embrace as a part of his devise the land newly attached to his old homestead. Occupation or non-occupation of the newly purchased lot by the owner of the old homestead in connection therewith must be considered as a most important element, upon the question whether it ever became a part of the homestead. *Otis v. Smith*, 9 Pick. 296. *Eliot v. Thatcher*, 2 Met. 44, n. Not that the circumstance that a portion of a well known and defined homestead has been occupied temporarily by a tenant would affect the construction of a devise, or prevent the entire homestead from passing as a homestead to a devisee; but the case to which the principle we have stated applies is, where there is the absence of any previous use and occupation of the premises as a homestead at any time.

The fact of being under one common inclosure or not would also be a circumstance of some weight. But here it appears that the fence which separated the two parcels when owned

by different owners remained unchanged from 1844 to the death of the testator.

The evidence indicating a purpose of the testator to have the control of this lot in his own hands, and to use it for any objects which might suit his convenience, or to annex it to his homestead, fails to establish the fact of its becoming a part of the homestead. The difficulty in sustaining the claim in behalf of the demandant is, that nothing was ever done from the time of the purchase of this lot to the death of the testator, a period of fifteen years, in the least indicative of an annexation of this parcel to the homestead lot, as parcel thereof.

The intentions of the testator as to the future appropriation and use of the newly purchased lot, whatever they may have been prospectively, were not executed, and did not fix upon it the character of a homestead, or parcel thereof.

The case of the demandant cannot be put upon the ground suggested by her counsel, that this lot is necessary for the convenient enjoyment and use of the house lot, as the evidence shows no such necessity. The question in the present case is as to a matter of fact, namely, had this parcel become a part of the house lot and homestead of the testator? Except that he had acquired a legal title to it, we see no act done by him giving to this lot this character.

In the opinion of the court, the superior court, for the reasons assigned by them, as stated in the bill of exceptions, properly ruled that the demanded premises did not pass by the devise to the demandant.

*Exceptions overruled.*

## MOSES KENDALL vs. EBENEZER MANN.

A resulting trust in land in favor of a third person may be established by parol evidence, although the deed recites that the consideration was paid by the grantee, and it was in fact paid by him, provided that it was distinctly agreed before the purchase that the sum paid should be considered as a loan from the grantee to such third person; but the proof upon this point must be full and clear.

BILL IN EQUITY, alleging that on the 15th day of January 1862 the plaintiff owned a certain farm; that he went into insolvency, and the farm passed to Stillman Cady, his assignee, subject to his homestead estate and his wife's initiate right of dower; that Cady offered the land for sale at auction, and the plaintiff employed the defendant to bid it off; that the defendant did bid it off as his agent and in his behalf, and took a conveyance to himself in trust for the plaintiff, and the plaintiff agreed to repay him whatever sums he should pay for the same; that thereafter, on the fifth day of January 1863, in order that the defendant might be able to reimburse himself for the amount by him advanced and paid for the plaintiff, and make sales of portions of the estate and portions of the wood and timber thereon, the plaintiff and his wife conveyed to the defendant their interest in the land, and in return the defendant made an instrument in writing, under seal, agreeing to reconvey to the plaintiff what should remain after he should reimburse himself, and that the instrument is lost; that the defendant has sold enough to reimburse himself, and refuses to reconvey the residue or state an account. In an amendment it was alleged that the plaintiff was led by the defendant to believe that the agreement contained the stipulations above stated, and, if it did not, the stipulations were fraudulently omitted; and that there was no other agreement in writing, and so a resulting trust to the plaintiff arose. The bill sought discovery as well as relief; and the answer denied all the material allegations of the bill, and alleged that at the time of receiving the conveyance from the plaintiff and his wife the defendant made a written agreement differing from that set forth in the bill, the particulars of which were stated.

At the trial, before *Gray, J.*, of an issue to the jury framed to determine the question whether the defendant took the farm upon the trust set forth in the bill, the plaintiff offered parol evidence to show that he employed the defendant to bid off the premises at the auction in his behalf and as his agent, and agreed to repay him whatever sum he should pay for the same, and the defendant did in such capacity bid off the same for the sum of \$407 over the incumbrances, and with the plaintiff's consent received in his own name a deed of the same from the assignee; that thereupon the parties further agreed that the defendant might sell off portions of the estate enough to pay the sum so bid and the incumbrances, and a compensation for the defendant's services and expenses, and then hold the residue in trust for the plaintiff; and to enable the defendant to do this more conveniently, the plaintiff and his wife made a quitclaim deed to the defendant of their rights of homestead and dower.

The judge excluded this evidence, and a verdict was taken for the defendant, and the case was reserved for the determination of the whole court. If the ruling was right, the case was to stand for a motion to amend the bill by alleging that the defendant executed such an agreement as was admitted in the answer.

*G. F. Hoar*, for the plaintiff. It is well settled that resulting trusts may be proved by parol. *Peabody v. Tarbell*, 2 Cush. 226. Such trust arises when a deed is taken in the name of one person and the purchase money is paid by another, or paid in behalf of another and advanced to him by the grantee, by way of loan. *Livermore v. Aldrich*, 5 Cush. 431. *Boyd v. McLean*, 1 Johns. Ch. 582. *Getman v. Getman*, 1 Barb. Ch. R. 499. *Beck v. Graybill*, 28 Penn. State R. 66. *Bartlett v. Pickersgrill*, 1 Eden R. 515; S. C. 1 Cox Ch. Cas. 15. *Browne on St. of Frauds*, § 90, and cases cited. The test is, whose money paid for the land? The defendant in this case acted solely as the plaintiff's agent, and had a claim upon him at once for reimbursement of the sum advanced. This sum was therefore, in legal contemplation, the money of the plaintiff.

*P. E. Aldrich*, for the defendant, in addition to some of the foregoing authorities, cited Gen. Sts. c. 100, § 19; *Fall River*

*Whaling Co. v. Borden*, 10 Cush. 458, 471; *Capen v. Richardson*, 7 Gray, 364; *Botsford v. Burr*, 2 Johns. Ch. 405.

CHAPMAN, J. Taking the averments in the bill and the offer of evidence in connection with each other, there appear to have been two separate transactions; and the first one must be regarded separately from the second.

The old and well established doctrine of equity, that a resulting trust may be proved by parol evidence, is recognized and adopted in this commonwealth. *Livermore v. Aldrich*, 5 Cush. 431. The ordinary cases of trusts of this character are where the purchase money is paid by one party and the conveyance is made to another. "But where a man merely employs another person by parol as an agent to buy an estate, who buys it for himself and denies the trust, and no part of the purchase money is paid by the principal, and there is no written agreement, he cannot compel the agent to convey the estate to him, as that would be directly in the teeth of the statute of frauds." 2 Sugden on Vend. (7th Amer. ed.) 912. Chancellor Kent says: "A trust results to A. because he paid the money. The whole foundation of the trust is the payment of the money, and that must be clearly proved. If, therefore, the party who sets up a resulting trust made no payment, he cannot be permitted to show by parol proof that the purchase was made for his benefit or on his account." *Botsford v. Burr*, 2 Johns. Ch. 409. He may show that the agent lent the purchase money to him, and that thus it was paid by him. In *Page v. Page*, 8 N. H. 187, the grantee of the land paid the purchase money, but he had agreed to lend it to the plaintiff for the purchase, and took the plaintiff's notes for it. The court held that this raised a resulting trust, but said that the evidence ought to be very clear and satisfactory in such a case. In *Boyd v. McLean*, 1 Johns. Ch. 582, the plaintiff had an agreement under seal with the owner for the purchase of the land, and had taken possession under it. He was permitted to show by parol that the defendant, who paid the purchase money and took the deed to himself, had agreed to lend the money to him, to be repaid in a certain time with interest, and took the deed to himself



as security for the money; and a decree of redemption was made in his favor. But Chancellor Kent said, if the point were *res integra*, he should be inclined to agree with Sir Thomas Clarke in *Lane v. Dighton*, Ambl. 409, that such evidence is too dangerous in its consequences. He further said that the cases uniformly show that the courts have been deeply impressed with the danger of this kind of proof, as tending to perjury and insecurity of paper titles, and they have required the payment by the *cestuis que trust* to be clearly proved. In *Getman v. Getman*, 1 Barb. Ch. R. 499, the plaintiff had no claim to purchase the property; but as it was to be sold at a sheriff's sale, he called on the defendant and requested him to advance the money for the bid, and give the plaintiff six years to repay it. The defendant assented to this arrangement, and bid off the property and paid for it. It was held that this was insufficient to establish a loan and raise a trust. The reason for requiring such fullness and clearness of the proof in such a case is, that where the money lent never passes into the hands of the plaintiff, and he gives no written security for it, the whole transaction, so far as the plaintiff is concerned, consists in his oral agreement. He does no act whatever, but by virtue of his agreement claims that he may appropriate to himself the benefit of the acts done by the defendant. The trust arises out of his mere parol agreement, and the acts he relies on are the acts of the defendant. It would be exceedingly dangerous to rely on the testimony of a party stating a mere oral agreement, and uncorroborated by any other evidence, to establish such a trust, even if his statement were positive and clear, and probably it would never be held sufficient.

In the present case the plaintiff had no peculiar right to purchase the land, and no right was given up by him to the defendant; but the defendant had the same right that the plaintiff had to bid for it at the assignee's sale. He does not allege in his bill or offer to show in evidence that the defendant agreed in terms to lend him the money in order that he might purchase the land; but he leaves this to be inferred from the fact that the defendant agreed to act as his agent in the purchase, and did so

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act, and that he agreed orally to repay the defendant whatever sum the defendant might pay for the land. This implies that the defendant was to advance the money as his own, and to give the plaintiff a right to repurchase on being repaid by the plaintiff, nearly or quite as clearly as it implies that he was to lend it to the plaintiff. At least it is equivocal, when we consider how unusual it is for men to lend such sums of money and take no written obligation for repayment; and it lacks that clearness which the plaintiff should establish in order to raise a resulting trust.

Whatever agreement was made afterwards would not raise a resulting trust, though followed by a conveyance of the plaintiff's right of homestead and his wife's right of dower. If the plaintiff can establish his case, it must be on the ground that there was an express trust.

*Verdict to stand, and cause to stand for plaintiff's motion to amend his bill according to the report.\**

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- \* Another case involving the same principle was argued at the same term.

## SAMUEL DAVIS vs. JOHN W. WETHERELL.

CONTRACT to recover money received by the defendant, upon the sale of an equity of redemption of land purchased by him of the plaintiff's assignees in insolvency, in which the plaintiff claimed that a resulting trust existed in favor of himself. At the trial in this court, Gray, J. directed a verdict for the defendant, upon facts which sufficiently appear in the opinion. The plaintiff alleged exceptions.

*T. L. Nelson*, for the plaintiff.

*P. E. Aldrich*, for the defendant.

CHAPMAN, J. The plaintiff contends that the defendant purchased the equity of redemption of the plaintiff's assignees in insolvency in trust for the plaintiff; that he violated the trust by selling the land, and that the plaintiff is entitled to maintain this action to recover the balance of the avails of the sale over and above the amount of the incumbrances which existed upon the land. The first fact to be proved is the existence of the trust. The plaintiff does not allege that any trust was declared in writing, but he offered at the trial his own testimony for the purpose of establishing by oral evidence a resulting trust. The only fact to which he testifies as occurring before the sale is a conversation between him and the defendant. In this conversation the plaintiff went no further than to say he should be glad to have the defendant buy the land, provided the

## COMMONWEALTH VS. GEORGE L. MOWRY.

In an indictment under Gen. Sta. c. 160, § 22, for robbery, being armed with a dangerous weapon, and wounding or striking the person robbed, it is not necessary to aver or prove that the wounding or striking was done with the dangerous weapon.

It is a sufficient averment of striking, under the above statute, to set forth that the defendant, being so armed, "the said A., in and upon the face and head of the said A., then and there did strike and wound."

INDICTMENT setting forth that George L. Mowry, on a day and at a place named, "in and upon one John G. Lewis an assault did make, and the said John G. Lewis in bodily fear and danger of his life then and there did put, and sundry bank bills, amounting to twenty-five hundred dollars and of the value of twenty-five hundred dollars, of the moneys and property of the said John G. Lewis, from the person and against the will of the said John G. Lewis then and there and by force and violence

plaintiff could have the privilege of redeeming it; and the only promise he represents the defendant as making is, that "he would see what he could do." There is nothing in all this tending to establish a resulting trust. In order to establish such trust, the plaintiff must prove that he paid the purchase money, or, if the defendant paid it, that he did so in behalf of the plaintiff. If the defendant furnished the money, it should clearly appear that he had lent it to the plaintiff, so as to make it the plaintiff's money when it was paid. Nothing of this kind is stated. This subject is discussed in *Kendall v. Mann*.

The resulting trust must arise at the time of the purchase, and cannot be created afterwards. 2 Washburn on Real Prop. 178. Therefore none of the other conversations or facts, all of which occurred some time after the sale, have any tendency to establish such a trust. If they tend to prove any trust, it was an express trust, such as can only be created by an instrument in writing. But in reality the plaintiff's testimony proves nothing more than that the defendant permitted the plaintiff to enjoy the privilege of continuing to occupy the land for a time, as he had occupied it before, upon payment of the interest accruing on the mortgage and the taxes, and also agreed that he might have the privilege of redeeming the land; but the plaintiff did not redeem it; and after the defendant thought a reasonable time had elapsed he sold it. The agreement as to the redemption was within the statute of frauds.

The plaintiff's testimony as to his intentions at the time of the first conversation was properly excluded, for his unexpressed intentions could not affect the defendant's rights.

*Exceptions overruled.*

did rob, steal, take and carry away; and that the said George L. Mowry was then and there armed with a certain dangerous weapon, to wit, metallic knuckles, and being then and there so armed as aforesaid the said John G. Lewis, in and upon the face and head of the said John G. Lewis, then and there did strike and wound."

This indictment was found under Gen Sts. c. 160, § 22, which is copied in the margin.\* At the trial in the superior court, before *Allen*, C. J., the defendant contended that the indictment contained no sufficient allegation of a robbery, the robber being armed, &c., and asked the court to rule that it would not be competent for the jury to convict him of that part of the indictment; but the chief justice ruled otherwise, and the defendant was convicted, and alleged exceptions.

*G. F. Verry*, for the defendant.

*Reed*, A. G., for the Commonwealth.

*BIGELOW*, C. J. The objection to the indictment upon which the defendant mainly relies is, that it does not aver that the striking and wounding therein charged were inflicted with the dangerous weapon with which it is averred that the defendant was armed at the time of the commission of the robbery. Or, looking into approved precedents, we do not find such averments to be usual in indictments under statutes similar to our own. For example, under the English statute of 7 Wm. IV. and 1 Vict. c. 87, § 3, which provides for the punishment of robbery by a person armed with any offensive weapon or instrument who at the time of such robbery shall beat or strike the person robbed, the form of indictment as given in Archb. Crim. Pl. (13th Lond. ed.) 353, contains no averment that the striking or beating was done with the weapon with which it is also alleged that the defendant was armed. Nor does it appear, by the statement of the evidence necessary to support such an

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\* "Whoever assaults another, and feloniously robs, steals and takes from his person money or other property which may be the subject of larceny, such robber being armed with a dangerous weapon, with intent if resisted to kill or maim the person robbed; or being so armed wounds or strikes the person robbed; shall be punished by imprisonment in the state prison for life."

indictment, that proof of that fact would be necessary. *Ib.* Roscoe's Crim. Ev. 892.

In indictments for robbery by a person armed with a dangerous weapon, with intent to kill or maim the person robbed, it is not necessary to allege either that the assault was committed with the dangerous weapon, or that the intent to kill or maim was to be carried out, in case of resistance, by means of such dangerous weapon. *Commonwealth v. Martin*, 17 Mass. 359. In *Commonwealth v. Gallagher*, 6 Met. 565, the indictment was under Rev. Sts. c. 125, § 13, which, with the exception of the punishment affixed to the crime, were the same as Gen. Sts. c. 160, § 22, under which the present indictment was found.

There was no averment in that case that the striking or wounding was inflicted with the dangerous weapon with which the defendant was armed. The same objection was taken to the indictment as that now urged by the counsel for the defendant. The case was disposed of on another ground, but no suggestion was made by the court that the objection was well founded. The counsel for the defendant thus failed to furnish us with any authority in support of his position.

Upon looking at the language of the statute, we find nothing which renders such averment necessary to show the consummation of the offence. There is no provision, either express or implied, that the striking or wounding is to be inflicted with the weapon with which the robber is armed. 'The gist of the crime is in committing a robbery while armed with a dangerous weapon, and in striking and wounding the party robbed, by whatever means the blows or wounds may be inflicted. The purpose of the statute is clear. The legislature intended that the actual commission of violence by striking or wounding, by a person in the possession of a dangerous weapon, should be regarded as a great aggravation of the crime of robbery. The statute therefore puts a robbery so committed on the same footing with one where the robber is armed with a dangerous weapon and actually intends to kill or maim the person attacked, if resisted. The reason is obvious. A wound or blow upon the person, however inflicted, would naturally lead to resistance and conflict, in which

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the use of the dangerous weapon with which the robber was armed would be likely to follow, with consequences as serious and dangerous to life and limb as if the robber had originally intended to kill or maim the party robbed, if resistance was offered. The striking and wounding are therefore deemed equivalent to the existence of the actual intent to do great bodily harm. In this view of the scope and purpose of the statute, it is clear that it is not necessary to aver or prove that blows or wounds were inflicted with the weapon with which the robber was armed.

The further objection is urged, that the indictment does not allege that the defendant did strike or wound the prosecutor. But this is not so. The last clause of the indictment, although somewhat inverted by putting the subject before the verb, and inserting between them another distinct averment, does charge that the defendant did strike and wound the person on whom the robbery is alleged to have been committed.

*Exceptions overruled.*

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COMMONWEALTH vs. LEWIS O. THOMPSON.

A man may be convicted of adultery who in good faith and in the belief that she is a widow marries and cohabits with a woman who has left her husband and remained absent from him for more than seven years together without hearing of him, if in fact her husband is still living.

INDICTMENT for adultery with Emeline B. Carlton.

At the second trial in the superior court, before *Allen, C. J.*, after the decision reported in 6 Allen, 591, it appeared that in November 1861 the defendant was married to said Emeline, and lived with her as his wife thereafter. The defendant called said Emeline as a witness, who testified that she was married to William B. Carlton in 1847; that they lived together for about two years in Dracut in this state, and then for about a year in Lawrence; that he was of dissipated habits and neglected to provide for her, in consequence of which she left him, and lived afterwards in various places until her marriage with the

defendant; that before her second marriage she read in a newspaper of the killing of William B. Carlton in a drunken row, at Billerica in this commonwealth, and believed it to be her husband; that she had no knowledge that he was alive and had not seen or heard from him for more than eleven years; and that she told the defendant before she married him that she was a widow. It appeared however that her husband was still alive, since her second marriage.

The defendant requested the court to instruct the jury that if they were satisfied that he married the woman in good faith, believing her to be a widow, and cohabited with her under such circumstances, and did not know or believe that she had a husband alive, he would not be criminally punishable for adultery, if at the time of the marriage her husband had remained absent from her for seven years together, and neither she nor the defendant knew that he had been living within that time. But the judge declined so to rule, and instructed the jury that when a wife departs from her husband and remains absent and distant from him, as in the present case, without knowledge or inquiry respecting him, no presumption of his death arises from the fact that she had not heard from him for seven years which would justify her in marrying and cohabiting with another man, and justify another man in marrying and cohabiting with her, and that the facts in this case, though they might go greatly to mitigate the offence of the defendant, did not amount to a legal justification.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

*G. F. Verry*, for the defendant, cited *Gen. Sts. c. 165, § 5; Commonwealth v. Thompson*, 6 Allen, 591, and cases therein cited; *Newman v. Jenkins*, 10 Pick. 515; *The King v. Twynning*, 2 B. & Ald. 386.

*Reed, A. G.*, for the Commonwealth, cited, in addition to cases cited above, *Commonwealth v. Mash*, 7 Met. 474.

**DEWEY, J.** As already stated, in reference to the present case when presented on a former bill of exceptions, (6 Allen, 591,) the mere fact that the defendant married Emeline B

Carlton in ignorance of the fact that she had a husband living constitutes no legal defence to this indictment. The most favorable view in which this defence could be sustained was that stated in the former opinion, "that if it appeared that the husband had absented himself from his wife, and remained absent for the space of seven years together, a man who should, under the existence of such circumstances, and not knowing her husband to have been living within that time, in good faith and in the belief that she had no husband, intermarry with her and cohabit with her as his wife, would not by such acts be criminally punishable for adultery, although it should subsequently appear that the former husband was then living."

But the case stated in this bill of exceptions is wanting in one of the essential facts stated as the foundation for a right to presume the death of the husband. It is only to the person who leaves his home or place of residence and is gone more than seven years and not heard of, that this presumption is applicable. Here the wife went away, and the husband for aught that appears remained at Lawrence, or in the vicinity. The facts show affirmatively that he was residing in Dracut in this commonwealth in 1859. Dracut was the place of residence of the parties for two years succeeding their marriage, and was the only place where they lived together, except in Lawrence, which is in its vicinity.

In the facts stated, we see no sufficient ground for any presumption of the death of the husband upon which the wife of Carlton or the defendant could properly have acted. The superior court very correctly marked the distinction, in the case where the wife leaves her husband and remains absent from him, in the ruling and instructions given to the jury.

The fact that the misconduct of the husband authorized the wife thus to leave him and continue absent, although it might justify her against all cause of complaint by the husband, and even warrant her obtaining a legal divorce for desertion, if continued for five years, under the provisions of our statute, does not affect the legal guilt of the defendant, however much these circumstances may avail him in mitigation of his punishment.

*Exceptions overruled.*

L-23326



AMY CARPENTER *vs.* CHARLES GREEN.

A decree of partition, in the probate court, setting off a portion of the real estate of a deceased person to his daughter, is conclusive upon her husband, when finally confirmed and established according to Gen. Sta. c. 136, if he assents thereto, and in the petition represents that she is entitled to a share of the estate in her right as an heir at law; and such partition will vest in her a valid title as against him and his heirs, although before the partition was made her title had become vested in him by means conveyances.

WRIT OF ENTRY, wherein the demandant claimed one fourth part of a piece of land in Sturbridge as heir at law of her deceased sister, Phebe Green.

At the trial in the superior court, before *Wilkinson, J.*, it appeared that Phebe Green, who was the wife of Nathaniel Green, was one of five heirs at law of Alpheus Drury, John Drury and Polly Drury, who were her brothers and sister, and the bill of exceptions set forth that she inherited the premises from them. On the 6th of May 1862, while the estates of said Alpheus and John were in the course of settlement in the probate court, all of said heirs, and Nathaniel Green as husband of Phebe, united in a petition to the judge of probate, alleging that Nathaniel Green and Phebe Green his wife, in her right, and the other heirs, were interested in all the real estate of said Alpheus and John lying in this commonwealth, claiming to hold as heirs at law of said deceased, each one undivided fifth part or share; that the names and residences of all parties now interested and their respective shares and proportions are as above set forth, and are not in dispute nor uncertain, they being owners of said real estate, and being all the persons interested therein. Upon this petition, a decree was made on the same day that partition be made as therein prayed for, and a warrant was issued to commissioners to make the partition, who assigned to Phebe Green in severalty, as her full share, the premises demanded in this action. Nathaniel Green appeared before the commissioners; they made return of the partition to the probate court; and the same was assented to by all the persons interested therein, Nathaniel Green signing his own name, and also that of his

wife, as her attorney. The partition was thereupon confirmed and established on the 3d of June 1862, by a decree of the judge of probate.

Before the above proceedings were had, namely, on the 24th of March 1862, Nathaniel and Phebe Green executed a deed of the premises to the tenant, who on the same day reconveyed them to the said Nathaniel; and the tenant claimed title as heir at law of Nathaniel, who died before the commencement of this action.

The judge ruled that the partition was conclusive against the said Nathaniel and the tenant; and a verdict was accordingly returned for the demandant. The tenant alleged exceptions.

*P. E. Aldrich*, for the tenant. As between Nathaniel Green and his wife, the partition did not transfer the title from the former to the latter. If one tenant in common conveys his property before partition, his alienee will, upon partition being made, take in severalty the portion set off to his grantor. *Cook v. Davenport*, 17 Mass. 345. *Pond v. Pond*, 13 Mass. 413. Green and his wife are to be regarded as one person, so far as the proceedings for partition are concerned. As between them and others interested in the estate, they were concluded by the decree; but as between themselves, the title remained unchanged.

*E. Mellen*, for the demandant.

COLT, J. At the time when the petition for partition was presented to the probate court, Nathaniel Green, under whom the tenant claims title as heir at law or devisee, was owner of the undivided interest which his wife, as heir at law of parties whose estate was then in course of settlement, had previously devised, and which, by the final decree of the probate court upon said petition, was assigned to her in severalty. Nathaniel Green, notwithstanding his title, joined in said petition, alleging that he and his wife were interested in the estate in her right; that the respective shares and proportions thereof were not in dispute or uncertain, and that the petitioners were the owners of said estate, and all the persons interested therein. The return of the commissioners appointed to make partition was assented to by all the parties to it in writing, said Green signing for himself

and as attorney for Phebe Green; and it was duly decreed by the probate court "that said report be accepted and the partition confirmed and established, and the premises be assigned as described and set off to the several parties therein named."

The question is, whether the proceedings of the probate court are conclusive evidence of the title of Phebe Green, against one claiming title under a party to said proceedings; and we cannot doubt that they are.

By Gen. Sts. c. 136, §§ 48-65, jurisdiction is conferred upon the probate court to make partition of the real estate of any deceased person whose estate is in course of settlement before it, with ample provision for the protection of the rights of all parties. The partition, when finally confirmed, is declared "conclusive on all the heirs and devisees of the deceased, and all persons claiming under them; and all other persons interested in the premises who appeared and answered in the case, or assented to the proposed partition as before provided, and on every person so interested on whom notice was served." § 64. These provisions are substantially the same as those contained in Rev. Sts. c. 103, and are to be construed in connection with the important changes there introduced in regard to the law of real property, as it respects both rights and remedies. In *Marshall v. Crehore*, 13 Met. 467, Chief Justice Shaw says that the general tenor of this chapter indicates that it was intended to make this proceeding by petition for partition to a much greater extent than formerly an adversary proceeding to try and decide controverted questions of title, and make it to a much greater extent binding and conclusive upon parties and privies, and this not as to possession only, but as to title. And the commissioners, in their notes on the same chapter, say that "a partition which binds the right of possession would, under this change in the law of real actions, bind the right of property also." These remarks have more particular reference to petitions for partition in the common law courts but are equally applicable to such proceedings coming within the probate jurisdiction. There is no reason why a decree of partition in the probate court should be any less conclusive upon

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the parties to it than a judgment in a real action. To permit one claiming under a party to such partition again to litigate the title would manifestly violate the maxim which declares that public interest requires an end to litigation. And the provisions of the statute for this object are equally reasonable and plain.

It appears that Nathaniel Green, in the proceedings for partition, made deliberate admissions upon the record inconsistent with the title which the tenant now claims he had at that time. Such admissions, made in the course of a judicial proceeding, may well be held conclusive on Green and those claiming under him, by way of estoppel.

*Exceptions overruled.*

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### ELBRIDGE MANN vs. SILAS MIRICK.

If a debtor who has been arrested on an execution and entered into a recognizance under Gen. Sta. c. 124, § 10, appears by attorney but not personally at the time and place fixed for his examination, the magistrate may entertain a motion of the attorney for an adjournment of the case to another time within thirty days from the day of the arrest, and may hold the motion under consideration till after the expiration of the hour, and the departure of the creditor's attorney, and then grant the same; and may discharge the debtor at such adjourned hearing.

CONTRACT against a surety in a recognizance, the condition of which provided that the judgment debtor, who had been arrested on an execution in favor of the plaintiff, should within thirty days deliver himself up for examination, giving notice of the time and place thereof, and duly appear, making no default, and abide the final order of the magistrate thereon.

At the trial in the superior court, before *Wilkinson, J.*, it appeared that a time and place were duly fixed for the examination of the debtor and notice given; that the debtor and plaintiff both appeared by counsel, but not personally, and the debtor's attorney within the hour moved for an adjournment to another time within the thirty days, to which the plaintiff's attorney objected; that after the expiration of the hour, and while the magistrate held the motion under consideration, the plaintiff's

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attorney departed, and thereafter the magistrate granted the motion; that the plaintiff's attorney did not appear at the time to which the case was adjourned, and the magistrate thereupon granted another adjournment to a time within the thirty days, notice of which was given to the plaintiff's attorney; and that, at such adjourned hearing, the magistrate discharged the debtor, the plaintiff not appearing.

The judge upon these facts directed a verdict for the defendant, and the plaintiff alleged exceptions.

*T. G. Kent*, for the plaintiff.

*H. B. Staples*, (*L. H. Wakefield* with him,) for the defendant.

GRAY, J. It is doubtless the duty of a debtor who has entered into a recognizance under Gen. Sts. c. 124, § 10, to appear in person before a magistrate at the time fixed for his examination, and the examination cannot well proceed in his absence. But the statute expressly provides that "the magistrate may adjourn the case from time to time, and shall have the same powers with respect to all other incidents thereto, as justices of the peace or other courts have in civil actions." Gen. Sts. c. 124, § 16. It is within the power of any court, in a civil action to which the defendant is bound to answer in person, to allow him, on account of sickness, or accident, or any other cause satisfactory to the court, to appear by attorney for the purpose of moving for a postponement of the trial. No more than this was done in the present case. The motion for an adjournment was made within the hour appointed for the examination, and the fact that the magistrate held it under consideration until after the hour had expired and the creditor's attorney had departed does not invalidate the order adjourning the case. At the time to which the case was adjourned the debtor appeared, and after another adjournment, of which notice was given to the creditor, he was discharged by the magistrate, within thirty days from the time of his arrest. The defendant was thus lawfully discharged from his recognizance, and the plaintiff cannot maintain this action.

*Exceptions overruled.*

## PATRICK KELLEY vs. SYLVESTER DRESSER.

The truth of a magistrate's record of a criminal case within his jurisdiction and determined by him cannot be impeached, even in an action against him for fraudulently and corruptly altering the complaint and warrant after the warrant had been served.

TORT against a trial justice for fraudulently and corruptly altering the complaint and warrant in proceedings against certain intoxicating liquors alleged to have been unlawfully kept by the plaintiff.

The declaration alleged that on the 2d of July 1863 the defendant was a trial justice, and two persons made a complaint to him that they believed and had reason to believe that certain liquors, which were described, were illegally kept and deposited by the plaintiff in a certain place, and prayed for a search warrant, under Gen. Sts. c. 86; that the defendant thereupon issued a warrant to search for the same liquors described in the complaint, which warrant was delivered to an officer for service, who thereupon entered the premises of the plaintiff, and seized certain other liquors not described in the complaint or warrant, and made return of his doings to the defendant, describing the liquors actually seized by him; that thereupon the defendant, after said service and return of the warrant, intending to oppress the plaintiff, corruptly and fraudulently made certain erasures, additions and alterations upon the complaint and warrant so as to make them conform to the officer's return, and so that he might order the liquors to be forfeited to the Commonwealth; and the defendant accordingly, after certain other proceedings, did order said liquors so seized to be forfeited to the Commonwealth, and the plaintiff was compelled to appeal to the superior court. Copies of the complaint and warrant, as the plaintiff alleged that they were in their original form, and copies of them as they finally stood, were annexed.

At the trial in the superior court, before *Wilkinson, J.*, the plaintiff introduced in evidence the original complaint and warrant, and contended that it was apparent from an inspection of them that the alterations, erasures and additions mentioned in

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the declaration had been made by the defendant since the papers had been originally drawn. He also testified that after the warrant had been served he called on the defendant for a copy of the warrant and officer's return, which the defendant furnished to him, having made the same in his presence; and this copy was produced in evidence, and corresponded exactly with the original warrant and officer's return thereon, except as to the alleged alterations. He also introduced copies of the judgment of the defendant, and of the papers in the case, from the files of the superior court, and in these copies the liquors were all described in the same way as in the officer's return, and the copy of the record of the judgment of the justice was partly printed and partly written upon the back of the copy of the complaint, and certified that the proceedings were had "by virtue of a warrant issued upon the within complaint," and throughout referred to the said complaint and warrant as the original complaint and warrant.

The defendant contended that parol evidence was inadmissible for the purpose of controlling or contradicting the record; and the judge ruled that upon the above evidence the action could not be maintained, and directed a verdict for the defendant. The plaintiff alleged exceptions.

*G. F. Verry*, for the plaintiff. The defendant cannot, in an action brought directly against him, shield himself from the responsibility of his acts, in fraudulently and corruptly altering the complaint and warrant, by adding thereto the fraud of making up a false record, and then setting up that in making the record he was acting as a magistrate in his judicial capacity and within the scope of his jurisdiction. See *Clarke v. May*, 2 Gray 410; *Piper v. Pearson*, *Ib.* 120; *Wells v. Stevens*, *Ib.* 115; *Sullivan v. Jones*, *Ib.* 570; *Haskell v. Haven*, 3 Pick. 404; *Spencer v. Perry*, 17 Maine, 413; *Yates v. Lansing*, 5 Johns. 282; *S. C.* 9 Johns. 395.

*P. E. Aldrich*, for the defendant.

CHAPMAN, J. A complaint was made to the defendant, who is a trial justice, against certain liquors, alleged to be illegally kept for sale by the plaintiff, and the defendant thereupon issued

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a warrant for the seizure of the liquors. The plaintiff alleges that the officer seized certain liquors that were not described in the complaint and warrant, and made return thereof to the defendant, and that the defendant thereupon fraudulently altered the description of liquors in the complaint and warrant so as to make it correspond with the officer's return, and then proceeded to try the case upon these altered documents. After a judgment was rendered in the case against the plaintiff, he appealed to the superior court and entered his appeal. He then produced in evidence a copy of the defendant's record, including the complaint and warrant. In this copy the description of liquors in the complaint and warrant corresponds with that in the officer's return. It appeared upon inspection that this was a correct copy of the record in its present condition. But the plaintiff attempted to establish his case by offering evidence tending to show that the defendant made the alterations above specified during the pendency of the proceedings before him. This was an offer to impeach the verity of the record, and for that reason the evidence was rejected.

The doctrine that a record imports absolute verity, and that no averment, plea or proof is admissible to the contrary, has been uniformly maintained from the earliest times, on grounds of public policy. It is too important and too well settled by authority to be questioned. The recent discussion of it in *Wells v. Stevens*, 2 Gray, 115, makes it unnecessary to refer to other authorities.

In this case it appears that the original record bears the marks of interlineations such as the plaintiff describes; but interlineations often exist in complaints and warrants. The practice of interlining such papers is slovenly and dangerous; but their validity is not thereby affected, when the alterations are made before they are delivered to an officer. Now if the existing record is true, it was so done. The face of the record imports it, and proof of a subsequent alteration would impeach the record, by contradicting it directly.

In receiving the complaint, and directing the form of the warrant, in the hearing of the cause and determining how to make



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up the record and what should be stated in it, the defendant acted judicially, and within his jurisdiction. It is well settled that a magistrate thus acting within his jurisdiction is answerable to the government only, and is not liable to be troubled by actions in behalf of individuals whose cases he has been obliged to try. The law on this subject has been thoroughly discussed in *Pratt v. Gardner*, 2 Cush. 63, and *Raymond v. Bolles*, 11 Cush. 315. The cases cited by the plaintiff's counsel in which magistrates have been held liable are cases where they either acted ministerially, or exceeded their jurisdiction.

*Exceptions overruled.*

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**HENRY B. BANCROFT vs. BOSTON AND WORCESTER RAILROAD CORPORATION.**

An action at law to recover damages for an injury which causes immediate insensibility, and death in fifteen minutes, survives to the administrator of the estate of the deceased.

Tort to recover damages for a personal injury received by the plaintiff's intestate, Francis H. Holman, by being run over by the defendants' locomotive engine.

At the trial in the superior court, before *Wilkinson, J.*, the plaintiff offered evidence that his intestate, being a passenger on the defendants' railroad, while necessarily passing from the cars across the track to the depot, and thence to the highway, and using due care, was struck by the defendants' engine, through their fault; that he survived the blow for fifteen minutes in what is commonly called a state of insensibility and then died, manifesting during the interval no signs of intelligence.

Upon this evidence the judge directed a verdict for the defendants, which was rendered accordingly; and the plaintiff alleged exceptions.

*G. F. Hoar*, for the plaintiff.

*F. H. Dewey & G. S. Hale*, for the defendants. In this case the death must be considered as instantaneous, and there was no legal or physical possibility of the deceased person's bringing

an action after the injury. *Kearney v. Boston & Worcester Railroad*, 9 Cush. 108. "Instantly" and "immediately" do not necessarily mean without any intervention of time. *The Queen v. Brownlow*, 11 Ad. & El. 119; S. C. 8 Dowl. Pract. Cas. 157. *The King v. Francis*, Cas. temp. Hardw. 105. Even if there was an appreciable space of time between the injury and the death, there was in this case no legal element of damages to be considered by the jury. Death furnishes no ground of action. There was no pain, loss of time, expense or interruption of labor; in short, no element of legal damage, separable from the death itself. Sedgw. on Dam. (3d ed.) 453-455, 554. *Pack v. Mayor, &c. of New York*, 3 Comst. 489, 493. *Boulter v. Webster*, 11 Law Times, (N. S.) 598.

BIGELOW, C. J. We are unable to distinguish this case in principle from *Hollenbeck v. Berkshire Railroad*, 9 Cush. 478. The continuance of life after the accident, and not insensibility or want of consciousness, is the test by which to determine whether a cause of action survives. It is so distinctly put in the case cited, and we see no ground for doubting the soundness of the rule as there laid down. In the case at bar it is expressly found that the plaintiff's intestate survived the accident for fifteen minutes. The length of time during which life remains is not material in determining whether the cause of action survives. Suppose a person should have received an injury by which one of the main arteries was severed, and life thereby extinguished in five minutes. If he was a soldier or sailor, and received such injury in actual service, there can be no doubt that a nuncupative will made by him would be valid. The time, though brief, would be sufficient to enable the person so injured to do a valid legal act. Can there be any doubt that, under the same circumstances, a cause of action would accrue to him against a party who negligently caused the injury, which would survive to his administrator? Time, then, cannot be the test by which the right of the personal representative to sue can be tried; nor can the absence or presence of consciousness or sensibility be the standard. It was so held in *Hollenbeck v. Berkshire Railroad*, *ubi supra*. We are brought back, therefore, to the

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only rule which can be practically applied, and that is, if the party injured lives after an accident the right to sue accrues and survives.

In *Kearney v. Boston & Worcester Railroad*, 9 Cush. 108, it appeared that the plaintiff's intestate was instantaneously killed. The motion of the body after the injury, as there shown, did not indicate life, but only the spasmodic muscular contraction which is often the concomitant of a violent death.

Upon the facts stated in the exceptions, we are of opinion that this action may be maintained to recover such damages as the plaintiff can show were sustained by his intestate during the time that he survived. Of course nothing can be recovered by reason of his death which ensued. *Exceptions sustained.*

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**RUSSELL MORSE & another vs. JOHN P. MASON & others.**

A devise to "the surviving children, not knowing all their names, of my late sister A., they living in the state of Maine, to be divided equally between them all," will be construed to be a devise to all those children surviving at the date of the will; and if one of them afterwards dies, leaving issue, before the death of the testator, such issue will take the share of their deceased parent, under Gen. Sts. c. 92, § 28.

BILL IN EQUITY to obtain the instructions of the court as to the distribution of the estate of SUSAN W. PRESCOTT, of Lancaster in this county, under the following clause of her will: "I give, bequeath and devise all the remainder of my estate, of whatsoever it may consist, to the surviving children, not knowing all their names, of my late sister Nancy Mason, they living in the state of Maine, to be divided equally between them all." Nancy Mason had eight children, four of whom died before this will was made, and one afterwards before the testator, leaving issue who survived the testator. The bill was taken for confessed against the other three children, and the case reserved upon the bill and the answer filed in behalf of said issue for the determination of the whole court.

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*P. E. Aldrich*, for the issue of the child who died after the will was made.

No counsel appeared for the other parties.

GRAY, J. The presumption that, as a will speaks from the death of the testator, it refers to the state of things then existing, must yield when the will manifests the testator's intention to refer to the state of things existing at the time of making it. We are of opinion that such an intention is clearly manifested in this case. The language of the gift "to the surviving children" of the sister of the testatrix, "not knowing all their names," shows that the testatrix would have given it to them by name if she had known what their names were, and must have the same effect as if she had. The clause "they living in the state of Maine" is added by way of description of the children then living, not to limit the gift to those who might happen to live in that state at the time of the death of the testatrix. The children among whom the residue was intended to be equally divided were therefore those surviving when the will was made; and one of them having afterwards died before the testatrix, leaving issue who survived the testatrix, such issue, by our statute of wills, take their parent's share. Gen. Sts. c. 92, § 28.

*Decree accordingly.*

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### MATTHEW LEE vs. CHARLES H. MILLER.

Making and recording a declaration, under Gen. Sts. c. 104, § 2, and beginning to build a house upon the land mentioned in such declaration, will not entitle one to an estate of homestead therein, until he actually occupies the same as a residence; and the fact that several months before making such declaration he had for a short time and for a temporary purpose occupied a house then standing upon the land, is immaterial.

TORT in the nature of trespass *quare clausum fregit*.

It was agreed in the superior court that the plaintiff purchased the premises, upon which an old house and barn were then standing, in April 1855; that he has ever since cultivated some portion thereof, and leased none; that in February 1861

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he made and caused to be recorded a declaration of his intention to hold them as a homestead; that in May 1861, having torn down the old house, he commenced building a new one upon the premises, and moved into the same in October of that year; that in July 1860 he moved upon the premises with his family and a part of his furniture and goods, for the purpose of cutting his hay and harvesting his oats, and having accomplished these things, which only occupied a few weeks, he returned with his family, furniture and goods, to Goulding's Village, a distance of one and a half miles, where, with the above exception, he lived from April 1855 to October 1861, being a leaseholder, and owning no other real estate but the premises above referred to.

On the 20th of July 1861 the plaintiff executed to the defendant a promissory note, upon which the latter commenced an action, and recovered judgment therein in November 1862, and levied his execution upon the premises, and the same were accordingly duly set off to the defendant thereon; and for the defendant's entry under his title thus acquired this action was brought.

Judgment was rendered in the superior court for the plaintiff; and the defendant appealed to this court.

*G. F. Hoar*, for the defendant.

*S. Cady*, for the plaintiff.

DEWEY, J. The single point of inquiry in this case is, whether the plaintiff had acquired a homestead estate in the premises before the debt to the defendant was contracted upon which the judgment was recovered and the execution issued by virtue of which this levy was made. This debt was contracted July 20th 1861, before which period the plaintiff had made a declaration in writing of his intention to hold the premises as a homestead, and the same had been duly recorded. The further inquiry is, whether that declaration was effective. On the part of the defendant it is denied that the plaintiff at the time of making the declaration held such a relation to the premises as entitled him to make an effective declaration. To do so, he must have been a householder having a family, and the premises must have been occupied by him as a residence. But he

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had only occupied the same with his family for the temporary purpose of cutting his hay and harvesting his oats; having thereafter returned to the house which he had occupied for many years in Goulding's Village, and where he continued to reside as before, until October 1st 1861. The old house upon the premises had been taken down, and he was building a new one in the summer of 1861, when the debt to the defendant was contracted; but the premises were not then occupied as a residence by him. This debt existed before the homestead estate was perfected, and the estate was therefore not exempted from this levy.

*Plaintiff nonsuit.*

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MARY ANN PITTS vs. STEPHEN A. ALDRICH.

In a suit to foreclose a mortgage which the wife of the mortgagor has signed for the purpose of releasing dower, it is not necessary to join her as a defendant, in order to defeat her inchoate right of dower in the equity of redemption.

BILL IN EQUITY to redeem a mortgage of land.

It was agreed that the plaintiff's husband executed the mortgage, in August 1847, she joining therein to release her right of dower; that the mortgage was assigned in October 1847 to Henry Goulding, who in February 1850, in an action against the plaintiff's husband alone, obtained conditional judgment for possession of the premises, for breach of condition of the mortgage, and was duly put in possession thereof in April 1850, and so remained until August 1852 when he assigned the mortgage and conveyed all his interest in the premises to the defendant, who then entered into and has ever since remained in possession thereof. In October 1850 the defendant purchased the equity of redemption of the plaintiff's husband in the premises from his assignee in insolvency. The plaintiff's husband died in November 1858. The plaintiff never had notice that the defendant had entered upon or held possession of the premises for the purpose of foreclosing her right of redemption therein; and she has never released her right to dower in the equity of redemption.

On these facts, the case was reserved by *Hoar, J.*, for the determination of the whole court.

*S. A. Burgess*, for the plaintiff.

*G. F. Hoar*, for the defendant.

COLT, J. The plaintiff for the purpose of releasing her dower in the premises joined in a deed of mortgage given by her husband to secure the payment of a debt, and she has thereby barred her right to dower in the mortgaged premises, if before bringing her bill the holder of the mortgage has legally foreclosed the same. The mortgagee in such case has only appropriated the premises, in the manner authorized by the mortgagor by his conveyance, to the payment of the debt for which it was pledged; and to such appropriation by foreclosure for breach of condition the married woman consents when she releases her right, and cannot complain if she thereby loses her dower in the equity of redemption.

The case finds that the mortgage was foreclosed by the assignee of the mortgagee by an action at law brought against the mortgagor, who was also then tenant of the freehold. To this proceeding it is true the plaintiff was not made a party; nor was it necessary or proper that she should be, under our statute which authorizes the foreclosure by an action for possession, which is to be like a writ of entry "against whoever is tenant of the freehold." Gen. Sta. c. 140, §§-2, 8. The decisions of other states requiring the wife or widow to be made a party to proceedings in equity for foreclosing a mortgage in which she has released dower have no application in this commonwealth where a statute mode of foreclosure is provided which does not require that she should be joined or notified.

No question of merger or of payment of the mortgage by the defendant seems open in the case, for the bill expressly alleges that the defendant entered into possession of the premises under the mortgage and assignment, and has ever since continued in such possession, though he had previously become the owner of the equity of redemption by purchase from the assignee in insolvency of the mortgagor. The decisions of this court most clearly establish that the purchaser of an equity of redemption

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George v. Wood.

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from the assignee in insolvency of the mortgagor, who takes an assignment of the mortgage, may set up the mortgage and its foreclosure against a claim of dower made by one who joined in the mortgage for the purpose of releasing it. *Farwell v. Cotting*, 8 Allen, 211. *Strong v. Converse*, Ib. 557. *Brown v. Lapham*, 3 Cush. 551. *Savage v. Hall*, 12 Gray, 363.

*Bill dismissed.*

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NATHAN GEORGE vs. POLLY WOOD.

If land which is subject to a mortgage is afterwards sold with full covenants of warranty in two different lots to different purchasers at different times, and the mortgagee afterwards enters upon both of these lots for the purpose of foreclosure, and the foreclosure becomes absolute as to the lot last sold, the owner of the lot sold first, upon a bill seasonably brought, may redeem upon paying the balance due upon the mortgage debt after deducting the full value of the other lot, with the buildings thereon; and it is immaterial that the buildings were erected after he had acquired his title.

In such case the balance due at the time when the foreclosure of the lot last sold became absolute should be ascertained, and interest computed on the same thereafter.

**BILL IN EQUITY** to redeem land from a mortgage. After the former decision in this case, reported in 9 Allen, 80, a master was appointed to state the account, and by his report the following facts appeared, which were agreed to by the parties as true:

On the 8th of August 1853 Nathaniel Chessman mortgaged to Asa Wood, the defendant's intestate, a lot of land consisting of the premises now sought to be redeemed and another lot called the Holmes lot. On the 12th of May 1855 Chessman mortgaged to the plaintiff the lot now sought to be redeemed, with covenants of warranty. At this time there were no buildings on the Holmes lot. On the 20th of March 1857 Chessman mortgaged to C. B. Holmes the Holmes lot, with covenants of warranty. At this time a building had been erected upon this lot by Chessman. On the 8th of December 1859 the defendant entered upon both of the lots, under the mortgage to her intestate (who meanwhile had died) for the purpose of foreclosure; and the foreclosure of the Holmes lot became absolute; but the



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plaintiff filed the present bill to redeem his lot on the 5th of December 1862. On the 8th of December 1862 the value of the Holmes lot without the building was \$900, and the value of the building was \$500 more, making \$1400 in all. The defendant never received any rents and profits till after December 8th 1862, and the master stated an account computing interest on the mortgage note up to that date, and deducting the sum of \$1400 from the amount so found, and computing interest thereafter upon the balance; and so arrived at the sum which the plaintiff ought to pay in order to redeem. It was contended that this account ought to be made up with reference to the date of the hearing before the master; and he also stated an account made to that date.

The case was reserved for the determination of the whole court.

*P. E. Aldrich*, for the plaintiff.

*T. G. Kent*, for the defendant.

CHAPMAN, J. The principles on which this case depends are well settled in this commonwealth. It appears that the defendant's mortgage includes the plaintiff's lot and another called the Holmes lot. After making this mortgage to the defendant, the mortgagor Chessman made the plaintiff's mortgage with the usual covenants of a warranty deed. Chessman thereby became bound to save the plaintiff harmless from the defendant's mortgage, and as between them the plaintiff's debt became a charge upon the Holmes lot only. Chessman then erected the building on the Holmes lot; and being annexed to the realty, it was held by the defendant's mortgage as completely as the land on which it stood. While the property was in this condition, Chessman mortgaged the Holmes lot to Holmes, who took no better title as against the plaintiff than Chessman had. *Chase v. Woodbury*, 6 Cush. 143. *Bradley v. George*, 2 Allen, 392. *Welch v. Beers*, 8 Allen, 151. If Holmes had redeemed the defendant's mortgage, he would have had no claim on the plaintiff for contribution. If the plaintiff had redeemed it, he would have had a claim on the Holmes lot for the whole.

The defendant entered upon both lots, as he had a right to do

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for foreclosure. Before the right of redemption expired, the plaintiff brought the present suit to redeem his lot, but Holmes allowed the foreclosure to be completed as to his lot. By this foreclosure the title to the Holmes lot became absolute in the defendant, and was thereby applied, at its value, to the payment of the defendant's debt. *West v. Chamberlin*, 8 Pick. 336. *Hedge v. Holmes*, 10 Pick. 380. To that extent the plaintiff's lot was thus relieved from the incumbrance. But as the defendant had not been in actual possession, taking the rents and profits, until his foreclosure was perfected, he is not bound to account for them. *Hunt v. Maynard*, 6 Pick. 489. After the land became his, the rents and profits were his by virtue of his ownership, and the plaintiff has no right to an account of them.

By the application of this land to the payment of the debt, the plaintiff has had all the benefit of it to which he is entitled. He is entitled to redeem his own lot by paying the balance due on the debt, the value of the Holmes lot being deducted from the debt at the time of perfecting of the foreclosure. The first account of the master being made up on this basis is correct; and the defendant is entitled to interest on the sum found due, till the time when the plaintiff shall redeem.

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ALPHEUS M. MERRIFIELD vs. LOVELL BAKER.

A., having executed to B. two mortgages of land to secure certain promissory notes, assigned to B. as additional security certain policies of insurance, from mutual companies, upon the buildings, and afterwards conveyed the equities of redemption to B., who received the same in full discharge of the notes. A. also at the same time executed a release of all claims against B., and especially of any claim which he had or might have, growing out of the mortgages, or the debts secured thereby, or any matter or thing connected therewith. Subsequently B. received from the insurance companies certain sums for return premiums upon the expiration of the policies. *Held*, that the release by A. barred his right to recover these sums of B.

CONTRACT for money had and received by the defendant from various insurance companies to the plaintiff's use.

At the second trial in the superior court, before *Willkinson, J.*,

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after the decision reported in 9 Allen, 29, substantially the same facts appeared as are stated in the former report, namely, that the plaintiff, having executed to the defendant's testator two mortgages of real estate to secure certain promissory notes, and therein covenanted to keep the buildings insured against fire, and to assign the policies to the mortgagee, accordingly assigned three policies issued by mutual insurance companies, and, after the death of the defendant's testator, conveyed the equities of redemption to the defendant, who received the same in full discharge of the notes, as heretofore more fully stated. The defendant then put in evidence a release, executed by the plaintiff to him under seal at the time of the conveyance of the equities of redemption, releasing him "in his individual capacity, and as such executor, of and from all claims, demands, actions and causes of actions, of every name and nature, I have or may have against him in his individual capacity, and against him as such executor, or against the estate of said Lovell Baker, deceased, and especially any claim or cause or possibility of action which I have or may or might have against said Lovell Baker as executor, growing out of two certain mortgages given by me to said Lovell Baker, deceased, or the debts secured thereby, or any money paid on account of the same, or any matter or thing connected therewith, and any claims or cause or possibility of action I have or may have against said Lovell Baker in his individual capacity, growing out of any payment of money made to said Baker at or about the time of the execution of said mortgages, or growing out of any matter or thing connected with said mortgages, or his procuring the loan from said Lovell Baker, deceased, of the money advanced thereon."

The defendant afterwards received from the insurance companies certain sums as return premiums, upon the expiration of the policies, and he contended that this release covered and barred the plaintiff's claim to recover the same; but the judge ruled otherwise, and directed a verdict for the plaintiff. The defendant alleged exceptions.

*G. F. Verry*, for the defendant.

*G. F. Hoar & S. P. Twiss*, for the plaintiff.

**BIGELOW, C. J.** The decision of the question raised by these exceptions turns on the construction and effect of the release under seal from the plaintiff to the defendant, which was produced and relied on at the trial in defence of this action. This release was executed and took effect at the time the quitclaim deed of the mortgaged premises was delivered to the defendant, whereby the mortgage debts due from the plaintiff to the defendant's testator were extinguished and paid, and the defendant became the absolute owner in fee of the estates which he had previously held as mortgagee only, as is fully set forth in the previous report of this case in 9 Allen, 29. In giving an interpretation to the release, it is therefore to be regarded as part of the transaction by which a settlement was effected between the parties of their respective claims growing out of loans of money made by the defendant's testator to the plaintiff, and the mortgages from the latter to the former to secure such loans. Considered in this light, it seems to us, after careful consideration, that the release must be deemed to operate upon and extinguish the claim for money received to the plaintiff's use, which he seeks to enforce in this action.

There can be no doubt that the language of the release is sufficiently broad and comprehensive to include every claim which the plaintiff had at the time of its delivery to the defendant, or which he might afterwards have against the defendant individually or as executor, arising or growing out of the loans of money made to the plaintiff and the mortgages given as security therefor. The defendant is in terms discharged from "any claim or cause or possibility of action" which the plaintiff had "or may have against said Lovell Baker as executor" growing out of said mortgages or the debts secured thereby, "or any matter or thing connected therewith," and also from any claim or cause or possibility of action which the plaintiff then had "or may have" against said Baker in his individual capacity "growing out of any matter or thing connected with said mortgages," or the procuring of the loan from the defendant's testator. It is obvious that this language does not confine the release to claims or causes of action which existed at the time it took effect. It

is *ex industria* made to include future causes or possibilities of action which might accrue to the plaintiff thereafter, growing out of said loans and mortgages, and the transactions between the parties appertaining thereto.

The only question, then, to be solved is, whether the money which the plaintiff demands in this suit can be fairly and properly regarded as a claim or cause of action which had its origin or foundation in the dealings and negotiations and contracts of the parties which resulted in the making of said loans to the plaintiff and the mortgages given to secure them. It was held by this court in the previous decision in this case that the policies of insurance under which the defendant received the money which is the subject of this action were assigned to the defendant's testator, and held by the defendant as part of the collateral security for the debts due the former in connection with said mortgages, and that the latter received the money solely by reason of said assignments and as the representative and attorney of the plaintiff by virtue thereof. 9 Allen, 32, 34. It is clear, therefore, that at the time of the settlement between the parties, when the deed of release and quitclaim of the mortgaged estates was delivered to the defendant, and the mortgage debts were thereby and by force of the stipulations entered into between the parties extinguished and paid, the plaintiff had a valid claim against the defendant for the reassignment of said policies. In the absence of any agreement or stipulation concerning the policies, on the payment of the mortgage debts the right of the defendant to retain said policies or to demand and receive to his own use any money for return premiums from the insurers would cease. The right of the plaintiff to demand a reassignment of the policies was then a valid subsisting claim against the defendant. But the plaintiff did not retain this right. On the contrary, he expressly relinquished and discharged it by the terms of the release which he delivered to the defendant as part of the transaction or settlement, by which the dealings of the parties and their respective demands against each other growing out of said loans and mortgages were finally adjusted and closed. This release, therefore, seems to us to supply that

which the defendant failed to show at the first trial of this case, namely, that the policies and all rights under them were given up or relinquished to the defendant at the time of the arrangement between the parties for the extinguishment of the mortgage debt. 9 Allen, 33.

Nor can it be contended, because the money for the return premiums under the policies has been paid to and received by the defendant subsequent to the time when said release was delivered and took effect, that the cause of action is to be regarded as a new claim or demand not then in existence, which has accrued to the plaintiff by reason of facts subsequently occurring. The answer to this position is twofold. In the first place, as has been already said, the plaintiff had relinquished by the release his right to demand a reassignment of the policies, so that the defendant held them and all rights which might accrue to him by virtue thereof as assignee, free from all claim by the plaintiff. In the next place, the right to receive said money for the return premiums was clearly "a matter or thing connected" with said loans and mortgages, and an action to recover money so received, although the cause accrued after the delivery of the release, is a cause or possibility of action which arose and grew out of the transactions between the parties previous to the settlement and delivery of the release, and is therefore embraced within the terms of the instrument.

*Exceptions sustained.*

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### GEORGE L. PRENTISS vs. ADDISON PRENTISS.

If a testator, after devising certain land to his brother, on condition of his paying to the residuary legatee a certain sum, makes his wife residuary legatee, and provides that her rights under the will shall not be affected by the birth of any child born to him before or after his decease, a child born before his decease cannot maintain an action to recover the whole or any portion of the land devised to the testator's brother.

**WRIT OF ENTRY** to recover certain real estate in Worcester.

It was agreed in the superior court that George M. Prentiss

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*Prentiss v. Prentiss.*

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died seised of the demanded premises in November 1864. In March 1861 he made his will devising the same to his brother, Addison Prentiss, the tenant in this action, on condition that he should pay within one year after the testator's decease the sum of four thousand dollars for the benefit of the residuary legatee; and also providing that said Addison might receive one thousand dollars in money instead of said devise, if he should so prefer. The testator gave all the rest of his estate, real and personal, to his wife, Emily A. L. Prentiss, providing that "her rights under this residuary provision shall not be affected or changed by the birth of any child of mine, if any shall be born to me before or after my decease." The demandant is the only child of the testator, and was born ten days before the testator's death.

Upon these facts judgment was rendered for the tenant, and the demandant appealed to this court.

*J. D. Stevenson*, (of New York,) for the demandant.

*G. F. Hoar*, for the tenant.

DEWEY, J. The demandant asserts his right as a child of George M. Prentiss, deceased, to maintain the present action to recover certain real estate lately belonging to said Prentiss. The defence is, that George M. Prentiss died testate, having duly made his last will and testament, by which he disposed of all his property to other persons, and made his widow, Emily A. L. Prentiss, the residuary devisee of all his estate, real and personal. The fact of the existence and probate of such a will is conceded, and the only inquiry is, whether the case of the demandant falls within the provisions of Gen. Sts. c. 92, § 25, as the case of a child not provided for in the will of the testator. The demandant is the child of the testator, and was of the age of ten days at the time of the decease of his father. No provision was made for him in the will; and the sole inquiry is, whether it is sufficiently made to appear that such omission was intentional, and not occasioned by accident or mistake. The evidence upon this point is here furnished solely upon the face of the will. The testator, contemplating the event that has occurred in the birth of this child as one that might occur, has

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signified his purpose as to such child. All that is necessary to be shown is, that the matter was in the mind of the testator, and by him deliberately acted upon. Where a testator devised his estate to the children of his daughter, describing them as such, but giving no legacy to the daughter, this was held sufficient to exclude her from a distributive share of his estate. *Wild v. Brewer*, 2 Mass. 570.

Here the language is very significant. It is a direct and expressed exclusion of "any child born to me before or after my decease," from setting up a claim to the estate. As was decided in *Bancroft v. Ives*, 3 Gray, 367, the statute applies to children born after the making of the will and before the death of the father. But it is the entire statute, with all its limitations, and it is unavailing where it appears that the exclusion of such a child was intentional. This does appear in the present case, and therefore the title of the demandant to the real estate demanded is not sustained.

*Judgment for the tenant.*

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FREE CHASE vs. CHARLES KITTREDGE & others.

It is not a sufficient attestation of a will for a subscribing witness to write his name in the absence of the testator, and in anticipation of the testator's signature, although he afterwards acknowledges it in the presence of the testator and of the other subscribing witnesses.

APPEAL from a decree of the judge of probate, allowing an instrument as the will of Simeon Daniels.

At the trial in this court, before *Gray, J.*, one of the issues to the jury was as to the execution of the will. Joseph A. Sprague, one of the attesting witnesses, testified as follows:

"Mr. Daniels came into my office and told me how to draw his will. I made a rough sketch of a will and read it to him, and he said it was all right, and went out. I copied it, and he came back and sat down by my side. I read the will down to the seal, and said, 'Does that suit you?' He said it did. I



then read the witness clause and my name, and said, 'Mr. Daniels, I have written my name as a witness to your will.' After talking with him some time I went and called two other witnesses, Holden R. Greene and Carlton Cushman. When they came in they stood around the table. I said, 'This is Mr. Daniels's last will and testament;' and he bowed assent. He took the pen and wrote his name opposite the seal. I either repeated or read the witness clause to the other two witnesses. Then, pointing to my signature, I said to Cushman or Greene, 'Sign your name under mine, where I have signed as a witness.' Cushman signed his name, and Greene signed his name, and they did not stay a moment. Mr. Daniels remained after they went out. We three were all present when he signed his name. We were all close together, and he could see where I pointed for the other witnesses to sign. The will was in full view." On cross-examination this witness stated, "I put on the seal and my name while he was gone. I did not rewrite or retrace my name after he signed his."

The heirs at law objected that the facts stated by this witness would not warrant a verdict or decree establishing the will; and the case was thereupon reserved for the determination of the whole court.

*E. Mellen*, for the appellants, cited, in addition to cases cited in the opinion, *Hall v. Hall*, 17 Pick. 373, 375; *Re Summers*, 7 Notes of Cas. 562; *S. C.* 14 Jur. 791, and 2 Rob. Eccl. 295; *Faulds v. Jackson*, 6 Notes of Cas. Supp't, 1; *Leech v. Bates*, Ib. 704; *Re Webb*, 1 Jur. (N. S.) 1096; *Ilott v. Genge*, 3 Curt. Eccl. 160; *S. C.* 4 Moore P. C. 265.

*P. E. Aldrich*, for the appellee. It is fully settled that a testator need not execute his will in the presence of the witnesses, and that they need not sign in the presence of each other. It is enough if the testator sees their attestation, or is in a situation where he may see it. *Hogan v. Grosvenor*, 10 Met. 56. *Dewey v. Dewey*, 1 Met. 352. If in this case the witness Sprague had retraced his name with a dry pen, the attestation would have been sufficient. *Hall v. Hall*, 17 Pick. 375. *Jones v. Lake*, 2 Atk. 177, n. What was done by the witness was equally

significant with retracing his name with a dry pen. See *Dewey v. Dewey*, above cited; *White v. Trustees of British Museum*, 6 Bing. 310. Where a statute required wills to be executed in the presence of witnesses, it has been held that it was not essential that the signature should be made in their presence, but an acknowledgment of it was sufficient. *Adams v. Field*, 21 Verm. 256. See also 1 Redfield on Wills, 220, *n*. Wills have also been held well executed, where the testators did not sign till after the witnesses. *Rosser v. Franklin*, 6 Grat. (Va.) 1. *Vaughan v. Burford*, 3 Bradf. (N. Y.) 78. There is a conflict between recent English and American authorities upon the point whether the witnesses must subscribe in the actual presence of the testator. See *Jesse v. Parker*, 6 Grat. 57; *Upchurch v. Upchurch*, 16 B. Monr. (Ky.) 102; *Horton v. Johnson*, 18 Georgia, 396; *Boldry v. Parris*, 2 Cush. 438. A witness may adopt a name already written, as well as rewrite it. *Pollock v. Glassell*, 2 Grat. 439. *Sturdivant v. Birchett*, 10 Grat. 67. *Ex parte Leroy*, 3 Bradf. 227. *Campbell v. Logan*, 2 Bradf. 90. *Ruddon v. McDonald*, 1 Bradf. 352. 1 Redfield on Wills, 247. The recent English cases, which are in conflict with the American cases, appear to have been decided upon the most strict and narrow construction of the English statutes, sacrificing substance in adhering to form. The reasoning of Lord Campbell in *Roberts v. Phillips*, 4 El. & Bl. 450, seems more worthy of consideration.

GRAY, J. This case presents an important question of construction of the statute of wills, upon which there has been much apparent, and some real, conflict of judicial opinion, and in the consideration of which it is essential to keep in mind the exact language of the enactments under which cases have arisen.

By the original English statute for the prevention of frauds and perjuries, passed in 1676, it was enacted that "all devises and bequests of any lands or tenements shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed, in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void

and of none effect." *St. 29 Car. II. c. 3, § 5.* That act did not extend to the Colony of Massachusetts, which had been previously settled, and was not named therein. *2 P. W. 75. St. 25 Geo. II. c. 6, § 10.* But the provision was reenacted here in the same words in the first year after the Province Charter; and again in 1783, substituting only the words "three or more" for "three or four" witnesses. *Prov. St. 4 W. & M. (ed. 1726,) c. 3, § 3, p. 5; Anc. Chart. 234. St. 1783, c. 24, § 2.* It was retained, and extended to personal estate, in 1836, in this form: "No will" (excepting nuncupative wills) "shall be effectual to pass any estate, whether real or personal, nor to charge or in any way affect the same, unless it be in writing, and signed by the testator, or by some person in his presence and by his express direction, and attested and subscribed, in the presence of the testator, by three or more competent witnesses." *Rev. Sts. c. 62, § 6.* And the words just quoted have been incorporated, with trifling variations, into the General Statutes, *c. 92, § 6.*

This provision, it will be observed, does not expressly require that the testator should sign in the presence of the witnesses; nor that the witnesses should subscribe in the presence of each other, nor even that they should know that the instrument is a will. Courts will not require formalities which the statutes do not. It is accordingly the well settled construction, both in England and in this commonwealth, that it is sufficient for the testator, in any form of words, to acknowledge or recognize his signature in the presence of the witnesses, either together or separately, with no attestation clause beyond the single word "witness," and without their knowing what the instrument is. The authorities upon these points are collected in the elaborate judgment of Mr. Justice Dewey in *Ela v. Edwards*, 16 Gray, . It is equally well settled that when the attesting witnesses are dead or out of the state, proof of their handwriting is sufficient evidence that the statute has been complied with. *Nickerson v. Buck*, 12 Cush. 344. *Ela v. Edwards*, just cited.

The positive requirements of the statute have always been reasonably construed by the courts so as not needlessly to embarrass compliance with them in making any will, or proof of

such compliance upon the offer of the will for probate. It has long been held that evidence that a witness was in such a position that he and the testator might have seen one another will authorize the inference that he was in the presence of the testator and sufficiently near to attest his signature. And the signature of the testator, if affixed in good faith for the purpose of executing his will, need not be in any particular form; a man who cannot write his own name is not to be deprived of the right to make his will; and courts will not go into nice questions of the degree of the testator's education or his physical strength to sign his name in full, but will hold a mark sufficient in any case. *Baker v. Dening*, 8 Ad. & El. 94; *S. C. nom. Taylor v. Dening*, 3 Nev. & P. 228. *Nickerson v. Buck*, 12 Cush. 344.

The question now before us is of the meaning of that clause of the statute which requires the witnesses to "attest and subscribe" the will "in the presence of the testator."

The only case under the *St.* of 29 Car. II., which we have seen, in which it was even contended by counsel that an acknowledgment by a witness, in the presence of the testator, of a signature made in his absence, was equivalent to a subscription in his presence, arose only six years after the passage of the statute; and the point does not appear to have been then decided. *Risley v. Temple*, Skin. 107. But the difference in the two clauses of the statute, the one not requiring the testator to sign in the presence of the witnesses, while the other expressly required the witnesses to subscribe in the presence of the testator, soon came to be recognized, and does not appear to have been afterwards lost sight of. *Hoil v. Clark*, 3 Mod. 219, 220. *Lee v. Libb*, 1 Show. R. 69. *Dormer v. Thurland*, 2 P. W. 510. *Stonehouse v. Evelyn*, 3 P. W. 254. Bac. Ab. Wills, D, 2. 2 Bl. Com. 377. 1 Browne's Civ. & Adm. Law, c. 10, note 27. 1 Roberts on Wills, (Amer. ed.) 131. Flyer's Proctor's Practice, 127. The statute of frauds, while it required a will to be "attested and subscribed in the presence of the devisor by three or four credible witnesses," required a revocation to be by a written will, "or other writing of the devisor, signed in the presence of three or four

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witnesses." *St. 29 Car. II. c. 3, §§ 5, 6.* The court of king's bench in 1689 were of opinion that a will, to revoke a former will, must be "signed and subscribed" by the witnesses in the presence of the testator. *Eccleston v. Speke*, Carth. 81; *S. C. Comb. 158.* And Lord Chancellor Cowper was of the same opinion. *Onions v. Tyrer*, 1 P. W. 344. Lord Hardwicke, Chief Justice Willes, Chief Baron Parker, and Sir John Strange, M. R., when holding, in accordance with earlier and later decisions, that a testator's acknowledgment of his signature before the witnesses was a sufficient signing by him, even of a will revoking an earlier one, and that the words "signed in the presence of three or four witnesses," in the section concerning revocations, were limited to the last antecedent, "other writing," clearly implied that those words would not be satisfied by acknowledging a signature, instead of actually signing in the presence of the witnesses. *Ellis v. Smith*, 1 Ves. Jr. 10; *S. C. 1 Dick. 225.* And see 1 Jarman on Wills, (4th Amer. ed.) 153. The English cases in which it has been held that the witnesses to a will are not required by § 5 of *St. 29 Car. II.* to recite on the paper that they subscribe their names in the presence of the testator, declare that they must actually so sign in his presence. Thus the court of common bench in 1735, as reported by Lord Chief Baron Comyns, said, "The witnesses, by the statute of frauds, ought to set their names as witnesses in the presence of the testatrix." *Hands v. James*, Com. R. 532. And in a later case Lord Eldon said in the house of lords, "Your lordships know that it is necessary that the three witnesses should sign in the presence of the testator." "If it is proved that they did actually sign in the presence of the testator, the not recording that circumstance will not vitiate the will." *Rancliffe v. Parkyns*, 6 Dow, 202.

A new statute of wills was passed in England in 1837, requiring that the signature of a testator to a will, either of real or personal estate, shall be made or acknowledged by him "in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator." *St. 1 Vict. c. 26, § 9.* The decisions under this statute are uniform that one witness does

not "attest and subscribe in the presence of" another unless he actually affixes his signature in the presence of the other; and these decisions bear directly upon the construction of the same words in the English *St.* of 29 Car. II. and in our own statutes, requiring the will to be "attested and subscribed in the presence of" the testator by the witnesses. The point was adjudged in the prerogative court of Canterbury by Sir Herbert Jenner Fust in several cases, the last of which, decided after full argument, and recognizing that "this case must form a leading case of its class," was strikingly analogous to the present. There the testator signed a codicil in the presence of one witness only, who at his request attested and subscribed it. Afterwards another witness, at the testator's request and in his presence, also attested and subscribed it, the first witness first pointing to her signature and saying, "There is my signature, and you had better place yours underneath." *Re Allen*, 2 Curt. Eccl. 331. *Re Simmonds*, 1 Notes of Cas. 409; *S. C.* 3 Curt. Eccl. 79. *Moore v. King*, 3 Curt. Eccl. 243; *S. C.* 2 Notes of Cas. 45. In a subsequent case the same able judge said of the witnesses, "No authority is given to them, as in the instance of the testator, to *acknowledge* their signatures previously written. The witnesses are to *subscribe*, in other words, they are required, I conceive, to do some act which shall be apparent on the face of the will. To pass over a signature, previously made, with a dry pen amounts, I think, to no more than an acknowledgment of a signature, which in the case of a witness has already been held not to be sufficient. *Moore v. King*. Saying and doing are not the same thing." And he therefore held that upon the reëxecution of a will an attesting witness did not "subscribe" by tracing over his signature with a dry pen, "as nothing in fact was written." *Playne v. Scriven*, 1 Rob. Eccl. 775; *S. C.* 7 Notes of Cas. 122. He also decided that it was not an attestation and subscription for a witness to add his residence after his name already subscribed on a previous day. *Re Trevanion*, 2 Rob. Eccl. 311.

Other decisions of Sir Herbert Jenner Fust are directly to the point that a signature by the testator after the witnesses have signed is insufficient, even if he has previously read the whole

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will to them, or they add seals to their names after he signs. In the first of these cases, the judge significantly asked, "Is the paper a will before it is signed by the testator?" *Re Olding*, 2 Curt. Eccl. 865. *Re Byrd*, 3 Curt. Eccl. 117. In a later case, which was fully argued, he reaffirmed the rule, and gave his reasons more at length, saying, "The words of the section are very precise, and I think it would be attended with dangerous consequences, if the court were to hold a will valid which has been signed in the presence of two witnesses, who have attested it before the signature of the testator was affixed to the will; for where is the court to draw the line? Suppose the witnesses attested one hour before the testator signed, or a day, or a week, or any other time; where is the court to stop if it gave a latitude of construction to this section of the act? Suppose it were one month, or six months, or a twelvemonth, after the testator had signed the will; and whether it be at the time of the transaction or some time before makes no difference." *Cooper v. Bockett*, 3 Curt. Eccl. 659, 660. Dr. Lushington, sitting in the same court, held it to be a fatal objection to the validity of a will, that "there is no proof that the signature was affixed prior to the subscription of the witnesses." *Hudson v. Parker*, 1 Rob. Eccl. 39. And Sir John Dodson made a similar decision in *Shaw v. Neville*, 1 Jur. (N. S.) 408.

The law is stated in the same way, without criticism or dissent, by Lord St. Leonards, in his Essay on the Real Property Statutes, 332, 336; and in his Handybook of Property Law, Letter XIX. And the decisions of Sir Herbert Jenner Fust have been approved and followed by Sir Creswell Creswell in the new English court of probate and divorce. *Charlton v. Hindmarsh*, 1 Swab. & Tristr. 433. *Re Cunningham*, 29 Law Journal, (N. S.) (Prob.) 71. *Re Hoskins*, 32 Law Journal, (N. S.) (Prob.) 158.

In *Charlton v. Hindmarsh*, *ubi supra*, one witness, Frederick Wilson, signed his name in the testator's presence and at his request in the morning, omitting to cross the F in his signature. In the afternoon of the same day another witness attested and subscribed the will in the presence and at the request of the

testator; and the first witness, as he testified, then acknowledged his signature to the second by saying that his name was there already, crossed the F, merely in pursuance of his habit of supplying the omission when he noticed it, and added the date, thinking that equal to a repetition of the signature, and with the object of making his signature of the morning a complete signature. From the decision of the judge ordinary against the will an appeal was taken to the house of lords, who, by the concurrent opinions of Lords Campbell, Cranworth, and Chelmsford, unanimously affirmed the judgment. *Hindmarsh v. Charlton*, 8 H. L. Cas. 160. The reasons for the decision are best stated by Lord Cranworth, thus: "For the security of mankind, the legislature has thought fit to prescribe certain forms and rules which are necessary to be complied with, in order to authorize a distribution of property, different from that which the law would make if there was no will; the legislature, in truth, on these forms being complied with, putting into the hands of the party who is making a will, power to dispose of his property in a way contrary to what, but for the will, would be the provision of the law. That it is reasonable that, under these circumstances, there should be some rules to be acted upon, no one can doubt; and those rules being established, this house, as the ultimate court of appeal, would be, I think, ill discharging its duty to the public if it were to listen to suggestions of minute differences which would not meet the ordinary apprehensions of mankind, and which would necessarily or naturally lead to great discussion and litigation. It has been determined, upon the construction of the last statute, and quite rightly determined, that there must be a subscription by two witnesses after the testator has signed the will in their presence, or acknowledged his signature in their presence." "The acknowledgment of his signature by a testator is sufficient, but a witness stands in a different position. After the signature of the will by the testator, his acknowledgment will do; but by the express terms of the statute that will not do with regard to the witness. If he had said nothing at all, the putting a mark across the F might have amounted to an acknowledgment of the signature



but that will not do, and yet the facts here cannot amount to more than that." 8 H. L. Cas. 168, 169, 170.

We have been led to make a full collection and statement of the English authorities upon this point, because they have been said by those taking a different view of the law to be few in number and ill considered. An English case or two from which some assistance has been sought by way of analogy to support this will remain to be noticed.

The court of queen's bench in *Roberts v. Phillips*, 4 El. & Bl. 450, held that the subscription of the witnesses need not be below the signature of the testator or the end of the will. And there is an early ruling of Lord Chief Justice Trevor to the same effect. *Peate v. Ogily*, Com. R. 197. But in each of those cases there was direct or circumstantial evidence that the names of the witnesses were signed after the testator's signature and in his presence; there is no intimation by the court that any presumption of a valid execution would arise, even after the death of the witnesses, from subscriptions so placed; and Lord Campbell, who delivered the opinion in *Roberts v. Phillips*, afterwards concurred in the judgment of the house of lords in *Hindmarsh v. Charlton*, above cited. The decision in *Roberts v. Phillips* went no farther than to allow an attestation, apparently insufficient, to be made good by evidence that the requisites of the statute had been actually complied with. But if the signature of a witness, made before that of the testator, is allowed to be sufficient upon proof of a later acknowledgment by the witness in the testator's presence, then the witnesses may subscribe an instrument not yet signed by the testator and in his absence, with the honest intention of acknowledging their subscriptions to him after he shall have signed; his name may be signed at any time afterwards, without any witness to observe and testify whether it is affixed by him or by his authority or not, and, if it is, whether he is sane or insane; and the previous subscription of the witnesses be held after his death to be evidence of a due execution and attestation, when in fact his name is forged, or at least there has been no subscription or acknowledgment by the witnesses in his presence

and so, on the loosest interpretation, no compliance with the statute.

Reference has also been made to the rule that a witness may subscribe by a mark as well as by writing his name in full. This is now well settled both in England and in the United States. 1 Jarman on Wills, (4th Amer. ed.) 73 and Amer. note. The counsel for the appellee asked, "If a witness may adopt what is made by another, cannot he adopt what is made by himself?" But the mark is not made by another, but by the witness himself, and has never, so far as we are informed, been held sufficient unless affixed in the presence of the testator. Even a signature of a witness's own name when his hand is guided by another person is held sufficient in England only because the witness has some share in the writing. *Re Mead*, 1 Notes of Cas. 456. *Re White*, 2 Notes of Cas. 461. *Harrison v. Elvin*, 3 Q. B. 117. *Lewis v. Lewis*, 2 Swab. & Tristr. 153. And we have seen no American decision which goes further, except that of the surrogate in *Campbell v. Logan*, 2 Bradf. 90. A subscription of the name or mark of a witness by another person in the presence of himself and the testator might possibly be a literal compliance with the statute, but, not being in the handwriting of the witness, would create no presumption of a lawful execution and attestation, without affirmative evidence that it was so made. In the case referred to in 3 Dane Ab. 452, in which this court held the mark of a witness a sufficient subscription, the record shows that the will of Stephen Needham was admitted to probate upon the testimony of the three witnesses to a compliance with all the statute requirements, and, among others, "that they and each of them in the presence of the said Stephen and at his request and in the presence of each other subscribed the said instrument, namely," two of them "severally wrote their names at full length upon the said instrument" and the third "made a mark thereto, upon and near which and with her consent the said Stephen wrote her name at full length." *Needham v. Needham*, Essex, November Term 1802.

There is no direct decision in this commonwealth upon the

question whether the subscription of a witness to an instrument yet unsigned by the testator and in his absence may be made good by afterwards acknowledging it in his presence. Certainly no careful attorney or scrivener would advise or permit such an attestation and subscription. And many expressions in our books tend to show that it would be invalid. Mr. Dane recognizes the doctrine that if the testator owns his signature to the witnesses, it is sufficient, but assumes that the witnesses must subscribe in his presence. 4 Dane Ab. 562, 563. In *Laughton v. Atkins*, 1 Pick. 543, 544, Chief Justice Parker, quoting *Eccleston v. Speke*, above cited, said that to comply with the statute of frauds, a will must be "signed and subscribed by the witnesses in the presence of the testator." The commissioners on the Revised Statutes, in recommending that the formalities required for a will should also be required for an instrument of revocation, (as the legislature accordingly did in the Rev. Sta. c. 62, § 6,) remark that our statute of 1783, like the *St.* of 29 Car. II., from which it was copied, made this difference between the two, which they italicize as follows: "The former must be attested and subscribed by three or more witnesses *in the presence of the testator*; but it is not required that *he* should sign it *in their presence*; whilst an instrument revoking a will must be signed by the testator *in the presence of three or more witnesses*, but it is not required that *they* should subscribe it in *his* presence, nor indeed that they should subscribe it at all." In *Dewey v. Dewey*, 1 Met. 354, Mr. Justice Dewey said, "It can hardly be supposed that the testator, who was by his own active agency procuring the authentication of the instrument by the requisite witnesses, would have omitted the first step necessary to its due execution, viz. the signature by himself." These words are quoted with approval in *Ela v. Edwards*, above cited. In *Boldry v. Parris*, 2 Cush. 433, the questions whether a witness might sign before the testator, and whether an acknowledgment by a witness in the presence of the testator was equivalent to a subscription, were raised by counsel, but not noticed in the opinion because there was no evidence that one of the witnesses so much as acknowledged his signature in the testator's presence.

The supreme court of Vermont, under a statute exactly like our own, except in requiring the witnesses to attest and subscribe in the presence of each other as well as of the testator, has indeed held, with the courts of England and of Massachusetts, that an acknowledgment by the testator of his signature in the presence of the witnesses is sufficient. *Adams v. Field*, 21 Verm. 256. But the same court has held that an acknowledgment by one witness, in the presence of the others and of the testator, of a signature made in the absence of one of them, is not a subscription in their presence. *Pope v. Pope*, 38 Verm.

The supreme court of New York, under the provisions of the English St. of 29 Car. II., assumed it to be necessary that the witnesses should subscribe in the presence of the testator, and inferred the fact of their having so subscribed from their signatures to an ancient will, although not stated in the attestation clause. *Jackson v. Christman*, 4 Wend. 282. And in *Peck v. Cary*, 27 N. Y. 31, 32, Chief Justice Denio quoted as entitled to great weight the opinions of Sir Herbert Jenner Fust in *Cooper v. Bockett*, above cited, and other cases. The decisions cited by the appellee from Bradford's Surrogate Reports were made under a statute which required each attesting witness to "sign his name as a witness, at the end of the will, at the request of the testator," but omitted the requirement of earlier statutes that the witness should sign in the testator's presence. Rev. Sts. of N. Y. (3d ed.) pt. 2, c. 6, § 32. 4 Kent Com. (6th ed.) 515. *Rudder v. McDonald*, 1 Bradf. 352. *Vaughan v. Burford*, 3 Bradf. 78. *Hoysradt v. Kingman*, 22 N. Y. 372. The statute of Illinois under which the case of *Vaughan v. Vaughan*, 13 Amer. Law. Reg. 735, arose, had a similar omission, and only required the will to be "attested in the presence of the testator by two or more credible witnesses." Comp. Sts. of Illinois of 1856, c. 110, § 1. And these decisions were but of single judges in county courts of probate.

The case of *Miller v. McNeill*, 35 Penn. State R. 217, to which the appellee has referred, arose under the Pennsylvania statute of 1833, providing that "every will shall be in writing, and,

unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof or by some person in his presence and by his express direction, and in all cases shall be proved by the oaths or affirmation of two competent witnesses." By that statute, as by the previous law of Pennsylvania from very early times, the witnesses need not subscribe at all, even to a will of real estate. *Hight v. Wilson*, 1 Dall. 94. *Rohrer v. Stehman*, 1 Watts, 463. In Delaware, under a statute like ours, it was held that the witnesses must sign in the presence of the testator, and the distinction between such a statute and that of Pennsylvania was pointed out by Chief Justice Clayton. *Rash v. Purnel*, 2 Harring. 458. *Pennel v. Weyant*, Ib. 506.

In New Jersey, under a statute in terms requiring wills to be "signed by the testator in the presence of the subscribing witnesses," an acknowledgment of his signature is held insufficient. *Den v. Milton*, 7 Halst. 70. *Combs v. Jolly*, 2 Green Ch. 625. *Mickle v. Matlack*, 2 Harrison, 86. And in the last case Chief Justice Hornblower, who dissented on this point, as well as Mr. Justice Dayton, who concurred with the majority of the court, thought that the witnesses must sign in the presence of the testator. 2 Harrison, 96, 116.

The supreme court of North Carolina, under a statute like ours of 1783, have held in at least three cases, the facts of two of which were singularly like those now before us, that a will could not be established unless the witnesses actually set their names in the testator's presence, and that, as said in the earliest case, "it was the intention of the legislature that the heirs at law should not be disinherited but by a strict compliance with the words of the act, and that the door to fraud should be completely shut." *Ragland v. Huntingdon*, 1 Ired. 561. *Graham v. Graham*, 10 Ired. 269. *In re Cox's Will*, 1 Jones, 321.

In Connecticut and Kentucky it has indeed been held, under statutes not unlike our own, that a witness might sign in the presence of the testator before he signed, and acknowledge it afterwards. *O'Brien v. Galagher*, 25 Conn. 229. *Swift v. Wiley*, 1 B. Monr. 117, approved in *Upchurch v. Upchurch*.

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16 B. Monr. 113. But the only decisions, which have come to our notice, in which an acknowledgment by a witness to a will in the testator's presence, of a signature affixed in his absence, has been held to be an attestation and subscription in his presence, are those of a bare majority of the court of appeals of Virginia in *Sturdivant v. Birchett*, 10 Grat. 67, and *Parramore v. Taylor*, 11 Grat. 220. We have not overlooked the similar opinion expressed by Mr. Redfield in his learned Treatise on Wills, 230, 247, and in 13 Amer. Law Reg. 741.

This analysis of the cases shows that by the preponderance of American authority, as by the uniform current of the English decisions, an express requirement of statute that one person shall sign or subscribe in the presence of another is not complied with by signing in his absence and merely acknowledging in his presence. And upon full consideration we are satisfied that in this, as in most other legal matters, reason and principle are on the side of authority and precedent.

The statute requires that the will shall "be in writing and signed by the testator," and shall be "attested and subscribed, in the presence of the testator, by three or more competent witnesses." He is not required to write his signature in their presence, but it is his will which they are to attest and subscribe. It must be his will in writing, though he need not declare it to be such. It must therefore be signed by him before it can be attested by the witnesses. He must either sign in their presence, or acknowledge his signature to them, before they can attest it. The statute not only requires them to attest, but to subscribe. It is not sufficient for the witnesses to be called upon to witness the testator's signature, or to stand by while he makes or acknowledges it, and be prepared to testify afterwards to his sanity and due execution of the instrument, but they must subscribe. This subscription is the evidence of their previous attestation, and to preserve the proof of that attestation in case of their death or absence when after the testator's death the will shall be presented for probate. It is as difficult to see how they can subscribe in proof of their attestation before they have

attested, as it is to see how they can attest before the signature of the testator has made it his written will. The manifest intention of the statute is that, 1st, the will should be put in writing and signed by the testator; 2d, his will so written be attested by the witnesses; and 3d, the witnesses subscribe in his presence in evidence of their attestation to his written will. There is less reason for requiring the testator to sign in the presence of the witnesses, than for requiring them to sign in his presence. A testator may alter his will as he pleases at any time before it is formally attested. He may write it out in full and sign it, and it has no effect as a will until duly attested. It is unimportant whether it is or is not signed by the testator until it is produced to the witnesses. It is only important that it should be his will in writing and signed, when they attest and subscribe it; and it is equally his will in writing, whether signed in their presence or at some previous time. It is the will of the testator, not of the witnesses. He must know its contents, but they need not. He has the contents, as well as his signature, by which to know that it is the instrument declaring his last wishes in respect to his estate. They need see nothing but his signature and their own. To allow them to acknowledge in his presence their names signed in his absence would open a door to mistake and fraud. If the witnesses might subscribe before they had attested his signature, and even before he had signed, of what weight could their subscription be as evidence, after their death, that the will had been duly signed and attested? But the controlling consideration is, that the statute in terms requires not only that the witnesses shall attest his will, but that they shall subscribe in his presence. The distinction in this respect between the signature of the testator and the subscription of the witnesses has existed in the statute law both of England and of Massachusetts for nearly two centuries, and been preserved in repeated enactments when other clauses have been altered. The court cannot presume so constant a difference in language to have been unintentional, or disregard it as immaterial.

As it appears by the testimony stated in the report that one of the attesting witnesses subscribed his name before the testator

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signed and in his absence, the instrument offered for probate should have been disallowed.

*Decree of the judge of probate reversed.*

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GEORGE W. RICHARDSON & others vs. JONATHAN B. SIBLEY.\*

A street railway corporation has no power to mortgage its franchise, road or property without legislative authority; and under *St.* 1864, c. 229, a mortgage by such corporation of substantially all of its property, without such authority, is wholly void.

REPLEVIN of horse cars and other property attached by the defendant, a deputy sheriff, as the property of the Worcester Horse Railroad Company, upon a writ in favor of the Central National Bank of Worcester. The facts were agreed in this court, and the following are all that, under the decision, proved to be material :

The Worcester Horse Railroad Company was chartered as a corporation by *Sts.* 1861, c. 148; 1863, c. 19; and 1864, c. 102, under which it was organized and went into operation. On the 15th of February 1865 the corporation executed to the plaintiffs a mortgage of all the property, real and personal, (except four small cars, which were not included in this suit,) which it then owned or might thereafter acquire, including the railroad track, furniture, rolling stock, cars, horses, and other property of every description, and all appurtenances, appendages and franchises of the corporation; in trust, however, to apply the proceeds to the payment of certain bonds therein described, in case the corporation should not pay the same at maturity. Bonds corresponding with the description contained in the mortgage and referring to it were accordingly issued.

The Central National Bank of Worcester became creditors of the above corporation in February 1864, to the amount of \$2500, as security for which they afterwards accepted bonds to

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\* This case was argued in Boston in January 1866, before the same justices.  
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that amount, issued as above set forth; and commenced an action upon their debt, in which the cars and other property now replevied were attached by the defendant; being a part of the same property included in the mortgage to the plaintiffs. Due demand was made by the plaintiffs upon the bank.

*B. F. Thomas & D. Foster*, for the plaintiffs. If the corporation was capable of mortgaging the property described in the writ, the instrument would avail *pro tanto*, even though it included other property which the company were by statute prohibited to mortgage. *Irvine v. Stone*, 6 Cush. 508. *Rand v. Mather*, 11 Cush. 1. *Commonwealth v. Hitchings*, 5 Gray, 485. *Amesbury v. Bowditch Ins. Co.* 6 Gray, 607. The corporation clearly had the power either to sell or mortgage these articles of personal property prior to the enactment of *St. 1864, c. 229, § 24.* *Shaw v. Norfolk County Railroad*, 5 Gray, 180. *Treadwell v. Salisbury Manuf. Co.* 7 Gray, 393. *Commonwealth v. Smith*, 10 Allen, 448. That statute does not deprive the corporation of the power to mortgage its personal property. A mortgage is not within the terms of the statute, which extends only to sales and leases, and must be construed strictly, because it takes away a common law right. *Schooner Paulina v. United States*, 7 Cranch, 52. *Smith v. Spooner*, 3 Pick. 229. *Sewall v. Jones*, 9 Pick. 412. By the reasoning of the defendant, if carried one step further, the corporation could not contract a debt, which might be the foundation of an execution, and so of a sale; or sell even the smallest article of personal property, though it had ceased to be useful. The legislature did not intend to disable this class of corporations from voluntarily securing their debts upon property which creditors may sweep away in the order of successive attachments. *Ryegate v. Wardsboro*, 30 Verm. 749. The true construction of the act appears from the history of the passage of the bill. Pub. Legis. Docs. 1864. The prohibition to sell or lease was inserted in a section providing how street railways under lease should make their annual returns.

*G. F. Hoar & T. L. Nelson*, for the defendant.

GRAY, J. A corporation has no power to do any acts which the legislature has expressly or by necessary implication

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prohibited it from doing. A corporation, created for the very purpose of constructing, owning and managing a railroad, for the accommodation and benefit of the public, cannot, without distinct legislative authority, make any alienation, absolute or conditional, either of the general franchise to be a corporation, or of the subordinate franchise to manage and carry on its corporate business, without which its franchise to be a corporation can have little more than a nominal existence. *Shrewsbury & Birmingham Railway v. London & Northwestern Railway*, 6 H. L. Cas. 136, 137. *York & Maryland Line Railroad v. Winans*, 17 How. 39. *Pierce v. Emery*, 32 N. H. 504, 508. *Hall v. Sullivan Railroad*, 21 Law Reporter, 140, 141. *Worcester v. Western Railroad*, 4 Met. 566. *Commonwealth v. Smith*, 10 Allen, 455, 456. Such was the opinion deliberately formed and expressed by this court in the case last cited, after able arguments in which the authorities were fully referred to; and a mortgage by a railroad corporation of its franchise, railroad and all other property, made without authority of the legislature, was accordingly declared to be void as against a subsequent valid mortgage to the Commonwealth.

The powers of the Worcester Horse Railroad Company under its charter are quite as limited in this respect. The only powers expressly conferred are "to construct, maintain and use a railway, with convenient single or double tracks," over such streets and highways in the city of Worcester as the mayor and aldermen may designate; and to purchase and hold such real estate in that city, "as may be convenient or necessary for the purposes and management of said road." *Sts.* 1861, c. 148, §§ 1, 8; 1864, c. 102. The main object of the legislature in establishing such corporations and granting to them the privilege of using the highways in a peculiar manner is not the profit of the grantees, but the accommodation of the public. *Commonwealth v. Temple*, 14 Gray, 89.

Some earlier statutes had expressly authorized particular corporations of this kind to mortgage their corporate property to secure the payment of bonds issued by them; and provided that, in case of failure to perform the conditions of such bonds, the

property might be sold, and the purchasers, before beginning the business of managing the road, should become a corporation with the powers and privileges, duties and restrictions, of the original corporation. *Sts.* 1855, *c.* 24 ; *c.* 408, § 11 ; 1856, *c.* 279 ; 1857, *c.* 278, § 9 ; 1859, *c.* 144, § 9 ; *c.* 202, § 13 ; 1861, *c.* 48, § 11 ; *c.* 147, § 4. And some such corporations had been in terms authorized to lease or assign their franchise and all or part of their tracks to other similar corporations. *Sts.* 1855, *c.* 338 ; 1857, *c.* 211, § 4 ; *c.* 216, § 4 ; *c.* 227, § 14 ; *c.* 250 ; 1858, *c.* 38, § 9 ; 1859, *c.* 35, § 2 ; *c.* 180, § 2 ; 1861, *c.* 48, § 13 ; *c.* 81 ; *c.* 89, § 8 ; *c.* 90, § 3 ; *c.* 135, § 8. In each of those instances the property or franchise of the first corporation would pass into the possession and management of another corporation, subject to the like legislative control as the first ; not into the hands of individuals.

The charter of the Worcester Horse Railroad Company contains no express permission to make any lease, sale or mortgage whatever. In the absence of any such controlling clause, many provisions of the charter show that the legislature contemplated the exercise of its franchise by the corporation itself. "Said tracks shall be operated and used by said corporation with horse power only." *St.* 1861, *c.* 148, § 3. The only liability declared for injuries occasioned by neglect or misconduct in the management, construction or use of the road, or for wilfully obstructing the highway, is for the acts of the corporation, "its agents or servants," which would not naturally include agents and servants of its grantees or assignees. *St.* 1861, *c.* 148, §§ 4, 6. The right is given to the city of Worcester, at any time during the continuance of the charter and after ten years from the opening of any part of the road for use, to "purchase of said corporation all the franchise, property, rights and furniture of said corporation" at a certain rate ; § 12 ; and the corporation is obliged to make annual returns to the legislature, like other railroad corporations. § 14.

The fourteenth section of the charter also makes this corporation subject to "all general provisions of law that are or may be prescribed relative to horse or street railroads." *Tt*

St. of 1864, c. 229, entitled "an act concerning street railway corporations," declares that "street railway companies shall have the powers and privileges, and be subject to the duties, liabilities, restrictions and provisions, contained in this act, which, so far as inconsistent with charters heretofore granted, shall be deemed and taken to be in alteration and amendment thereof." § 1. There is nothing in this statute to authorize a sale or mortgage of the franchise of any corporation which did not have the power to make one already. The statute not only embraces provisions similar to those above quoted from the charter of the Worcester Horse Railroad Company, except that authorizing the city to purchase the franchise; §§ 16, 18, 24, 34, 40; but it expressly declares that "the immediate government and direction of the affairs of the corporation shall be vested in the board of the directors," and contains rules for the mode of managing its affairs by itself and its officers, not unlike those which were held by this court, in the case of *Whittenton Mills v. Upton*, 10 Gray, 596, to be inconsistent with permitting a manufacturing corporation to make a contract of copartnership with an individual; §§ 2-9; and it requires that "every such corporation shall furnish reasonable accommodations for the conveyance of passengers, and the directors may establish the rates of fare on all passengers and property conveyed or transported in its cars, subject however to the limitations named in its charter." § 26.

It is true that several sections of this statute speak of any such corporation, "its lessees or assigns;" §§ 18, 22, 29, 30, 31; and § 40 requires the directors to make annual reports to the secretary of the Commonwealth "of their doings under its charter," setting forth "copies of all leases and contracts made during the year with other corporations and individuals," and (as had previously been required by the Gen. Sts. c. 63, § 143) containing full information upon a great variety of items, among which are mentioned "number of mortgages on road and franchise," and "on any other property of the corporation," and the increase or decrease of mortgage debt during the year. The form of returns here prescribed is general, to be used by all

horse or street railway corporations, some of which had already received and others might afterwards obtain grants of authority to assign, mortgage or lease their franchise, road or other property. One object in requiring copies of all leases and contracts made during the year may well have been to enable the Commonwealth to determine whether any such corporation had exceeded the powers conferred by its charter or by other statutes, and should on that account be held to have forfeited its franchises.

That the mention of leases, assignments and mortgages was not intended to imply any new authority to execute any such conveyance is made quite clear by the express enactment of § 24 (which is decisive of this case) that "no street railway corporation shall lease or sell its road or property, unless authorized so to do by its charter, or by special act of the legislature." The manifest object of this section is to prohibit the transfer of the possession and control of the franchise and property of the corporation to any other person or corporation without authority from the legislature by which its rights were granted and its duties imposed. The prohibition is broader and more sweeping than is applied to ordinary railroad corporations. They cannot sell their franchises; yet they may contract with each other that either shall do all the transportation over the road of the other. Gen. Sts. c. 63, § 115. But these are not even to do that; they are not to "sell or lease." This prohibition is not limited to alienations of their franchises, but extends to their "road or property." It is unimportant whether this word "road" is taken in its narrower and more literal sense, as describing only the tracks and rails and right of way, or in the broader and more common meaning, as including also the franchise or right of running horses and cars over them and taking fares, and the horses and cars themselves; for even if it is to be taken in the more limited meaning, the prohibition to "sell or lease its road" cannot imply a permission to transfer the franchise, without which the corporation could not carry on the business of transportation over the road, and which the corporation had previously no power to alienate. If the prohibition against alienation had

been limited to the franchises only, the corporation might perhaps have disposed of the tracks and rails, as well as of the cars, horses and other personal property. The legislature have removed all doubt on this point, by prohibiting the sale or lease of the "road or property." They have not said, and cannot be fairly understood to mean, that the corporation shall not dispose of any part of its property, of a few horses or cars, or worn out rails, or other articles the sale or transfer of which would not impair its powers to carry on its business. But any alienation, either in fee, or for the period of its corporate existence, or for any less term, of substantially all its real and personal property, so as to disable it from carrying on the business which it had been chartered to do for the benefit of the public, is clearly within the terms and the meaning of this prohibition. It makes no difference whether the transfer is absolute or conditional, to take effect immediately upon its delivery or at some future time. A mortgage, transferring a title which upon the happening of a certain contingency may be made absolute by sale or foreclosure, has the effect, as soon as it becomes of any value to secure the purpose for which it was made, to accomplish as complete a transfer of the corporate franchise and property and the means of performing the corporate duty, as if it had been originally an outright sale.

It was argued by one of the learned counsel for the plaintiffs that the franchise to take toll might be taken on execution, and therefore might be mortgaged. It would be more accurate to say that such a franchise could not be sold or mortgaged, and therefore could not be taken on execution, without authority of the legislature. The Gen. Sts. c. 68, §§ 25-34, providing a mode of attaching and taking on execution "the franchise of a turnpike or other corporation authorized to receive toll, and all the rights and privileges thereof," are mainly derived from the *St.* of 1810, c. 131, which was passed shortly after the expression of a significant doubt by this court whether such a franchise could be taken on execution in the absence of express statute. *Tip-pets v. Walker*, 4 Mass. 596, 597. According to later authorities it could not. 2 Kent Com. (6th ed.) 284, *note*. Redfield on

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Richardson & others v. Sibley.

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Railways, 606. *Covington Drawbridge v. Shepherd*, 21 How. 124. *Gue v. Tide Water Canal*, 24 How. 263.

The *St.* of 1864, c. 229, and the charter of the Worcester Horse Railroad Company are public statutes which all persons dealing with that corporation were bound to take notice of and be governed by; and the restraints thereby established on the alienation of the franchise and property of the corporation were founded in considerations of public policy, which neither the corporation nor any other person can be allowed to evade or disregard. *Pearce v. Madison & Indianapolis Railroad*, 21 How. 443. *Zabriskie v. Cleveland, &c. Railroad*, 23 How. 398. *Whittenton Mills v. Upton*, 10 Gray, 598. *Commonwealth v. Smith*, 10 Allen, 459. The plaintiffs therefore acquired no title by the conveyance to them; and the creditors of the corporation could not, by taking bonds purporting to be secured by a conveyance which was void on its face, be estopped to deny its validity or to pursue the ordinary legal remedies for the collection of their debts.

It was strongly urged by the plaintiffs that even if this conveyance violated the provisions of the statutes of the Commonwealth, it might still be good so far as to pass a title in the particular articles attached by the defendant. But the conveyance undertakes to assign to the plaintiffs as one subject matter all the franchises of the corporation, and substantially all its property, real and personal, already owned, or afterwards to be acquired. It manifests no intention to convey these few articles apart from the rest of the property and franchises granted; and there is no rule of law by which these articles, rather than any other part of the property, can be separated from the mass mentioned in the deed, and the conveyance held good as to them. The prohibition of the statute is general, that the corporation shall not alienate its property. This corporation has violated the statute by undertaking to alienate substantially all its property. If the position of the plaintiffs could be maintained, it would avail equally against an attachment of any other part of the property so illegally alienated, and the corporation might set this conveyance up in turn against every creditor seeking to

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attach any property of the corporation; and this conveyance being invalid, the creditors would be left without any security for their debts, or any means of enforcing them against the property of the corporation.

This conveyance, whether regarded as a mortgage or as a deed of sale in trust, being wholly void and inoperative, because made in violation of the public policy of the Commonwealth as manifested in its statutes, it is unnecessary to consider particularly the nature of the instrument, or the other grounds upon which the defendant has denied its validity.

*Judgment for the defendant*

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**FREDERICK M. BALLOU vs. WELCOME FARNUM & others.**

In an action to recover damages for a personal injury, the plaintiff may introduce evidence to show the kind and amount of mental and physical labor which he was accustomed to do before receiving the injury, as compared with that which he has been able to do since, for the purpose of aiding the jury to determine what compensation he should receive for his loss of mental and physical capacity.

TORT against the trustees named in a mortgage executed by the Norfolk County Railroad Company upon their railroad and franchise, seeking to recover for a personal injury sustained by the plaintiff by being run against by a car of the defendants. The declaration alleged that by this act of the defendants he was hurt and put to great expense; and, being before able to earn large sums by his business, was rendered unable to labor in and conduct his business, and deprived of the earnings which he would otherwise have made. No objection was made to the form of the declaration.

At the second trial in this court, before *Gray, J.*, after the decision reported in 9 Allen, 47, the plaintiff was allowed, in order to show his bodily and mental capacity before the accident, and the extent of his injury, to introduce evidence that before the accident he owned and carried on a large mill for the manufacture of fancy cassimeres; used to select the patterns and colors,



which required constant attention and thought; bought part of the stock, hired the workmen, and agreed with them for their wages; superintended the putting in of machinery; conducted an extensive correspondence, and twice a year took an account of stock; and that since the accident he had been able to do very little that required mental application or physical labor.

The plaintiff then proposed to ask witnesses of suitable knowledge and experience whether the work at his mill was as well done after the accident as before; whether after the accident the business was conducted at a profit or a loss; what were the value and the usual compensation, at the time of the accident and since, of such services as the plaintiff performed before the accident, and of such as he could perform after it; and what compensation a person of the skill and capacity of the plaintiff would command in the market at the time of the accident and since. But all this testimony was objected to by the defendants, and excluded.

The defendants requested the presiding judge to instruct the jury that the plaintiff, if his business capacity was superior to that of men in general, was not on that account entitled to greater damages. The judge declined so to instruct the jury, and instructed them that if the defendants were liable in this action the plaintiff was entitled to recover, as part of his damages, compensation for his loss of physical and mental capacity, so far as proved to have been caused solely by the defendants' negligence; that there was no rule of law that one man was or was not exactly like another; that it was a question of fact for the jury what injury the plaintiff had suffered by the defendants' negligence, not what any other man had suffered; that the evidence of his occupation and capacity was admissible only in order to enable the jury to judge of the injury to his capacity; that this was an action for an injury to the man, and not for interfering with his business, and the damages must be limited to the personal injury to him occasioned by the defendants' negligence.

The jury returned a verdict for the plaintiff, with \$9687.50 damages; and the case was reported for the determination

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of the whole court, upon the competency of the above evidence, and the correctness of the above instructions.

*F. H. Dewey & E. B. Stoddard*, for the defendants. The law makes no distinction between men, and damages sustained by them are not to be measured by the wealth, occupation or capacity of the person injured. Evidence of the plaintiff's wealth, in owning a large mill, was improperly admitted. Evidence that he was a manufacturer, carrying on a large mill, afforded no evidence of the amount of damage sustained. Evidence that he was skilled in his occupation and able to perform a large amount of work therein does not prove any special damages sustained by him, without evidence that his occupation was profitable to him. The indemnity to which the plaintiff is entitled must be limited to such damages as were the direct and natural consequence of the wrongful act. Damages estimated upon the ground of loss of peculiar skill and business capacity must in their nature be conjectural and uncertain. The position and character of parties are admissible only when involved in the nature of the action, and when the injury is increased by them. 2 Greenl. Ev. § 269. The statute penalty upon a railroad company, in case of death resulting from their carelessness, is not varied by the station or capacity of the deceased. *Carey v. Berkshire Railroad*, 1 Cush. 480. If different passengers are entitled to different amounts of damages for similar injuries, railroad companies must charge a higher rate of fare for those whose occupation or capacity will entitle them to heavy damages.

*G. F. Hoar*, (*P. E. Aldrich* with him,) for the plaintiff.

COLT, J. The plaintiff in this action is entitled to recover as damages compensation for all such personal injury to him as was the necessary and proximate consequence of the alleged wrongful act of the defendants, and for such other injury as was the direct and natural, though not the necessary consequence thereof, and which is specially alleged in his declaration. It is averred that, being a manufacturer, before the accident able to earn large sums of money, he was by the injury rendered unable to labor in and conduct his business. No objection was taken

to the form of the allegation, and it is to be regarded as a sufficient statement that the injury had produced a diminution of capacity, either mental or physical or both. For the purpose of proving the extent of the injury, the plaintiff was permitted to introduce evidence to show his previous occupation as a manufacturer, the nature of the duties he was accustomed to perform, and that since the accident he was able to do very little that required mental application or physical labor; and it is now insisted that this evidence was improperly admitted. It is said that if the jury were permitted to take into consideration as an element of damage the loss of intellectual power and capacity of the plaintiff for business, the inquiry must of necessity include an estimate of the future profits of the business in which the plaintiff was or might thereafter be engaged; that such an estimate can furnish no safe basis for fixing the compensation, and must at best be conjectural and uncertain.

In general the profits of a future business are indeed too remote and uncertain to be relied on as an element in the estimate of damages. It does not follow that superior education, experience or ability in the management of business insures pecuniary success. The uncertainty of the continuance of health and life, with the taste and disposition for such pursuits, and especially the proverbial uncertainty of trade, preclude the making of any estimate which can have weight beyond the merest conjecture. If this evidence had been offered by the plaintiff with a view of increasing the damages on account of his wealth or peculiar skill as a manufacturer, or the large profits he would be able to realize in his future business, and it had been admitted for that purpose, the argument of the defendant would be entitled to further consideration. But it was offered only to show the extent of the personal injury by reason of the loss of mental vigor and endurance thereby occasioned. The diminution, whatever it was, could only be shown by evidence of strength before and weakness afterwards as manifested in the ordinary pursuits of the plaintiff. The presiding judge admitted it only for this restricted purpose, and carefully instructed the jury that it was admissible only in order to enable them to

judge of the injury to his capacity, and that the action was for an injury to the man, and not for interfering with his business.

In all actions of this description, and particularly in those in which damages for mental suffering or loss of mental capacity are sought to be recovered, the difficulty of furnishing by evidence the means of measuring the extent of the injury, so that the jury may be able to award with any certainty a pecuniary equivalent therefor, is at once apparent; and in this difficulty the defendants find argument for the support of their objection. But the answer is, that the law does not refuse to take notice of such injury on account of the difficulty of ascertaining its degree. In a variety of actions founded on personal torts, and in many where no positive bodily harm has been inflicted, the plaintiff is permitted to recover for injury to the feelings and affections, for mental anxiety, personal insult, and that wounded sensibility which follows the invasion of a large class of personal rights. The impossibility, in all such cases, of precisely appreciating in money mental suffering of this description is certainly as great as is suggested where the question is what shall be allowed for a permanent injury to mental capacity. The compensation for personal injury occasioned by the negligence or misconduct of others, which the law promises, is indemnity, so far as it may be afforded in money, for the loss and damage which the man has suffered as a man. Some of its elements may be bodily pain, mutilation, loss of time and outlay of money; but of more important consideration oftentimes is the mental suffering and loss of capacity which ensues. Of these several items of injury, if compensation is to be confined to those capable of accurate estimate, it will include but a small part, and must exclude all those injuries commonly regarded as purely physical; for the difficulty in ascertaining a pecuniary equivalent for the last named is precisely the same and quite as great as any that have been suggested. In fact, it will be found impossible to fix a limit to injuries of a physical nature so as to exclude from consideration their effect on the mental organization of the sufferer. The intimate union of the mental and physical, the mutual dependence of each organization — if

indeed, for any practical purpose in this regard, they can be considered as distinct — the direct and mysterious sympathy that exists whenever the sound and healthy condition of either is disturbed, render useless any attempt to separate them for the purpose indicated. It is obvious, upon a moment's reflection, that the powers and usefulness of the limbs and senses in ministering to the necessities and pleasures of the individual are to a great extent to be measured by the knowledge, experience and taste which he possesses, and which are purely qualities of the mind. Take the case of an injury to the right arm of a skilful painter or musician, for example. To show the extent of his injury, the plaintiff produces evidence of the use he was able to make of the arm before and after the accident. From such evidence alone could the jury judge of the plaintiff's loss. Such proof is constantly resorted to without objection in these cases. And still the chief value of the limb to its possessor consists in its skilful use, as controlled and directed by the cultivated taste and education of the plaintiff; and the chief loss to him is the loss of the power to make these purely intellectual endowments available for his pleasure or benefit. Or suppose the injury be to one of the five senses. Can any rule be adopted which shall limit the damages to that portion of the injury suffered which may be called only bodily?

There is a class of injuries, especially those which affect the brain and nervous system, to which this case seems to have belonged, where, by common observation, the most satisfactory symptom and proof of the physical injury is to be found in the weakness and derangement of the intellectual faculties. Upon the whole, then, upon principle we can see no error in the admission of the evidence, with the accompanying instructions. In the main it must always be left to the discretion of the jury to give such reasonable damages in these cases as in their opinion will afford compensation for the entire injury which the plaintiff proves he has sustained, subject to that power which remains in the court to set aside the verdict in those cases where the damages awarded are so excessive as to warrant the inference that some passion or prejudice or other improper considerations influenced them.

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We find two authorities in the supreme court of the United States, which go further than the necessities of this case require in support of the doctrines relied on. The first is the case of *Wade v. Leroy*, 20 How. 43. The declaration alleged that the plaintiff was injured by a blow upon the head, and in consequence of the wound his brain was affected and his memory and understanding impaired; that he was detained thereby and had been hindered and prevented for a long period from attending to his affairs, and lost and was deprived of great gains. The plaintiff offered to prove at the trial that before and at the time of the injury he was largely engaged in the business of distilling turpentine, and that after the accident he could not safely attend to any business. To this the defendant objected, on the ground that the declaration did not contain any specification of such business, or of its nature or extent, or any statement that the plaintiff was obliged to and did relinquish the same. The judges of the circuit court were divided in opinion upon the admissibility of the evidence, but it was held by the court admissible. Campbell, J., said that the evidence conduced to prove that the plaintiff before the time of the injury had been concerned in conducting a business that required a degree of mental and bodily vigor, and that his time was of some pecuniary value; or that he had suffered a loss of some profit; and would certainly assist a jury to determine that the plaintiff had sustained an injury of no slight character. These were the direct and necessary consequences of the injury. This decision was cited and approved by Nelson, J., in *Nebraska City v. Campbell*, 2 Black, 590. See also *Canning v. Williamstown*, 1 Cush. 451; *Baldwin v. Western Railroad*, 4 Gray, 333; Sedgw. on Dam. (3d ed.) 587.

The cases in New York not only sustain the grounds upon which we place this decision, but some of them go further than the true rule of damages in such cases would seem to require. *Lincoln v. Schenectady &c. Railroad*, 24 Wend. 434. *Ransom v. New York & Erie Railroad*, 15 N. Y. 415. *Tilley v. Hudson River Railroad*, 24 N. Y. 471. *Judgment on the verdict.*

**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME JUDICIAL COURT**  
**FOR THE**  
**COUNTY OF PLYMOUTH, OCTOBER TERM 1865,**  
**AT PLYMOUTH.**

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**PRESENT :**

HON. GEORGE T. BIGELOW,	CHIEF JUSTICE.
HON. CHARLES A. DEWEY,	} JUSTICES.
HON. EBENEZER R. HOAR,	
HON. HORACE GRAY, JR.,	
HON. JAMES D. COLT,	

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**IRA MERBITT vs. OLD COLONY AND NEWPORT RAILWAY  
COMPANY.**

- If a heavy article has been carried by a truckman to the depot of a railroad corporation, and injured while being loaded upon the cars, the railroad company are liable therefor if they had accepted and taken charge of the same; and in such case it is no defence to an action against them, that the injury resulted in part from the carelessness of the truckman.

TORT against a railroad corporation to recover for damages done to a caloric engine sent by the plaintiff to the depot of the defendants in South Boston for transportation to South Abington, while being loaded upon the cars.

At the trial in the superior court, before *Morton, J.*, the plaintiff introduced evidence tending to show that the engine was carried by a truckman, and upon its reaching the depot the train

for the day had gone, and the laborers at the depot had gone to dinner; that he notified the defendants' freight agent that he had come to deliver the engine, which was on a sled, and the agent replied that the men had gone to dinner and directed him to drive near a derrick, by a certain track, at which place heavy articles were loaded upon the cars, and there wait till the return of the men, who would run a car there and put the engine on board; that he did so, and when the men returned they ran a car there and commenced loading the engine, the agent of the defendants superintending and directing the work; that they put a chain round the engine and commenced hoisting, when the chain slipped; that they put it round again and the truckman tied it on with a rope so as to prevent its slipping, and they hoisted it again, when the engine swung heavily against the car, breaking it badly; that the boom of the derrick was not over the sled, and the derrick could not be worked properly, because it was frozen at the bottom. The derrick and chain belonged to the defendants.

The defendants introduced evidence tending to show that the laborers received their orders from the truckman, as to the mode of unloading the sled; that the freight agent requested the truckman to back his horse and sled, so that the engine might be directly under the end of the boom, but the truckman, in attempting to do so, started his horse forward, and pulled the sled from under the engine, by reason of which it swung against the car; and that the derrick was not frozen, but worked properly and freely.

The judge instructed the jury that the defendants' liability as common carriers commenced when the engine was delivered to and accepted by them for the purpose of transportation; that until such delivery the truckman, who was also a common carrier, would be liable; but after such delivery and acceptance the defendants would be liable for the negligence of those employed by them to load or transport the engine; that it was for the jury to determine from the evidence whether there had been such delivery and acceptance, and that in order to constitute such delivery and acceptance it must appear that the defendants had



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Merritt v. Old Colony and Newport Railway Company.

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through their agent taken and assumed the charge and custody of the engine, for the purpose of transportation.

After the charge, the defendants requested the court to instruct the jury what was in law an acceptance under the circumstances claimed by either side in this action ; but the judge declined to give any further instructions upon this point. The defendants further requested him to instruct the jury that if the accident happened by the joint negligence of the defendants' servants and the truckman, while acting in concert under the directions of the truckman, the defendants would not be liable but the judge declined so to rule, and upon this point instructed the jury that if the accident happened before a delivery by the truckman the defendants would not be liable ; but if, after such delivery and acceptance as above stated, the accident happened through the joint negligence of the defendants' servants and the truckman in assisting them to load the engine, the defendants would be liable.

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

*C. G. Davis*, for the defendants, cited *Pond v. Williams*, 1 Gray, 630 ; *White v. Winnisimmet Co.*, 7 Cush. 155 ; *Lane v. Old Colony & Fall River Railroad*, 14 Gray, 143.

*P. Simmons*, for the plaintiff.

Dewey J.\* The instructions given were correct, and sufficiently full to guide the jury as to their verdict.

The plaintiff introduced evidence tending to show that the engine was carried by a truckman to the freight station of the defendants, to be transported to South Abington ; that notice of its arrival was given to the freight agent, who directed the truckman to drive near a derrick by a certain track at which heavy articles were laden upon the cars, and there wait till the men came, when they would run in a car and put it on board ; that the truckman followed this order, and the men came, run in a car, and commenced loading the engine, the agent of the defendants superintending and directing the work, and the truckman being present also, giving assistance to prevent the chain

\* BIGELOW, C. J. did not sit in this case.

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which had been placed around the engine from slipping. The mode of placing the engine upon the cars by means of a derrick was an arrangement of the defendants, and they provided the derrick for that purpose.

The evidence on the part of the defendants, as to the superintendence and control of the operation of removing the engine from the sled of the truckman to the cars, conflicted with that of the plaintiff; and this was submitted to the jury. It became necessary to ascertain at what point, as respects the rights of the bailor, the truckman's responsibility for the safe transportation of the engine ceased, and when the same was cast upon the defendants. The court properly ruled that it was when the engine was delivered to and accepted by them for the purpose of transportation, and that in order to constitute such delivery and acceptance it must appear that the defendants had through their agent taken and assumed the charge and custody of the engine for the purpose of transportation. Story on Bailm. § 453.

Of course in deciding the question when the custody does thus attach, much will depend upon the manner in which they receive goods for transportation, the provision they make for raising heavy articles into their cars, and the active participation of the agent of the company in reference to the same.

As to warehousemen, it has been held that as soon as the goods arrive and the crane of the warehouse is applied to them to raise them into the warehouse, the liability of the warehouseman commences, and it is no defence that they are afterwards injured by falling into the street from the breaking of the tackle. Story on Bailm. § 445.

In the opinion of the court, the instructions were sufficiently full, and the further instructions asked were properly refused.

*Exceptions overruled.*

**MICAH S. BISHOP vs. INHABITANTS OF ROCHESTER.**

A town passed a vote "that all men belonging to the town, enlisting into the service of the United States, and who shall be accepted and mustered into the service of the same, shall receive a bounty from the town of one hundred and twenty-five dollars," and at the same meeting passed another vote "that, shall the full quota required of the town be enlisted and accepted as aforesaid, an additional sum of seventy-five dollars shall be paid each man thus enlisting, but should there be a failure in making up the full quota of nine months' men then those enlisting and being accepted and mustered as aforesaid shall receive only the sum of one hundred and twenty-five dollars each." After the lapse of nearly four months the quota was not filled, and a draft having been ordered, the town chose an agent who filled the quota by recruits from abroad. *Held*, that an inhabitant of the town who enlisted under the above votes was entitled to only one hundred and twenty-five dollars.

**CONTRACT** brought by an inhabitant of Rochester to recover bounty money voted by that town to enlisted soldiers.

It was agreed in the superior court that at a town meeting held on the 28th of August 1862, the town passed the following votes: "Moved by Samuel T. Braley and voted by the town that all men belonging to the town and enlisting into the service of the United States, and who shall be accepted and mustered into the service of the same, shall receive a bounty from the town of one hundred and twenty-five dollars. And it is further moved by said Braley and voted by the town that shall the full quota required of the town be enlisted and accepted as aforesaid, an additional sum of seventy-five dollars shall be paid each man thus enlisting, but should there be a failure in making up the full quota of nine months' men, then those enlisting and being accepted and mustered as aforesaid shall receive only the sum of one hundred and twenty-five dollars."

In consequence of these votes certain citizens of Rochester among whom was the plaintiff, enlisted and were accepted and mustered into the military service of the United States, as nine months' men. But the quota was not filled, and a draft was ordered by the governor of the Commonwealth on the 22d of November 1862, under authority of the war department, and on the 23d of December of that year the town chose an agent

who filled the quota by recruits from abroad ; and no draft was made in Rochester.

Upon these facts judgment was rendered for the plaintiff for two hundred dollars, and interest ; and the defendants appealed to this court.

*C. I. Reed*, for the defendants.

*T. M. Stetson*, for the plaintiff.

GRAY, J. The defendants admit that the votes passed by the town of Rochester on the 28th of August 1862 were ratified and made valid by the *St.* of 1863, *c.* 38, and that the plaintiff is entitled to recover the sum of one hundred and twenty-five dollars. The only question in the case is whether he is entitled to the additional sum of seventy-five dollars also, and we are clearly of opinion that he is not.

The manifest intention of the town was that only in case the full quota required of the town should be enlisted from among "men belonging to the town" and mustered into the service of the United States, "an additional sum of seventy-five dollars shall be paid each man thus enlisting." Such is the natural construction of the words of the votes ; and the motive for offering the additional bounty doubtless was to increase the efforts of all those who should themselves enlist, to act as a recruiting committee, and thus carry out the wish of the town to fill up its quota with its own citizens, a wish dictated alike by a feeling of honorable pride, and by a reluctance to enter into speculations for procuring recruits from abroad. Any other construction would give no effect to the very first words of the vote — "all men belonging to the town" — for if the words "enlisted and accepted as aforesaid" are not limited to inhabitants of the town, the next clause in the same vote, allowing the additional bounty to "each man thus enlisting," must be equally unlimited.

The town allowed, to those who enlisted with the hope and intention of inducing their immediate fellow-citizens to fill up the quota of the town, reasonable time and opportunity to accomplish that purpose. No other measures were adopted by the town to obtain recruits until four months after passing these

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Williams v. Inhabitants of Plymouth.

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votes, and more than one month after a draft had been ordered by the governor of the Commonwealth, under authority of the war department. The plaintiff has no right to complain that the town then resorted to other means to complete abroad what the inducements held out by the vote of the town had been proved by an experiment of four months to be insufficient to bring about at home; and no right to claim the additional bounty, after the town had been obliged to fill its quota with strangers, which had been promised to him in case that quota should be filled with its own citizens.

*Judgment for the plaintiff for \$125.*

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WILLIAM WILLIAMS vs. INHABITANTS OF PLYMOUTH.

An enlisted soldier can maintain no action against a town to recover bounty money, under a vote of the town appropriating a certain monthly sum during a certain time to each citizen who should enlist for the war, "to be paid in such manner and to such persons as the selectmen shall deem expedient."

CONTRACT brought by an inhabitant of Plymouth to recover bounty money voted by that town to enlisted soldiers.

It was agreed in the superior court that at a town meeting held on the 11th of May 1861, the town passed the following votes: "Voted, that the sum not exceeding fifteen hundred dollars is hereby appropriated for clothing and equipping such volunteers for three years or more service as are citizens of this town. Voted, that six dollars per month to each citizen of this town having a family, and four dollars per month to each citizen of the town who is single or unmarried, excepting commissioned officers, who shall enlist in the service of the United States for the war shall be and the same is hereby appropriated by the town as extra compensation for the term of actual service during one year from the first day of May current, to be paid in such manner and to such persons as the selectmen shall deem expedient." These votes were passed under an article in the warrant for the meeting, "To take action relative to equipment of

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volunteers and provision for their families, as the town may determine, and appropriate such sums of money as may be necessary to carry the same into effect." On the 18th of May the plaintiff enlisted for three years, and was duly mustered in, and served for nearly three years and until his discharge. When he enlisted he had a wife, and a child was afterwards born to him. The selectmen made various payments to his wife, from time to time.

Upon these facts judgment was rendered for the defendants; and the plaintiff appealed to this court.

No counsel appeared for the plaintiff.

*C. G. Davis*, for the defendants.

GRAY, J. The votes of the town of Plymouth of May 11th 1861, (assuming them to have been within the scope of the warrant from the selectmen, and confirmed by subsequent act of the legislature,) gave the plaintiff no right of action against the town. He enlisted for three years only, and it may well be doubted whether he can claim the extra compensation appropriated by the second vote of the town (upon which alone he relies) to those of its citizens who should "enlist in the service of the United States for the war." The difference in the language of the two votes tends to show that the distinction was in the minds of the voters. But the conclusive answer to this action is that the sum appropriated for extra compensation was "to be paid in such manner and to such persons as the selectmen shall deem expedient." Under this vote, the selectmen might pay the sum to any other person for the benefit of the soldier or his family, as well as to himself.

*Judgment for the defendants.*

JOHN M. GROVER *vs.* INHABITANTS OF PEMBROKE.

Under an article in a warrant for a town meeting "to see if the town will vote to appropriate a sum of money to aid the furnishing and equipment of volunteer military companies to be enlisted in this town and vicinity, and to take any necessary measures for the support of the families of those who are ordered to service, and act on anything relating to the above objects," the town may vote to pay a certain sum monthly to each citizen of the town who shall enlist in the military service.

If prior to *St.* 1861, c. 222, a town had voted that a certain sum monthly should be paid to each citizen of the town who should enlist in the military service of the state with the intention of serving in the army of the United States, if called upon, a citizen who so enlisted under that vote may, under that statute, maintain an action against the town to recover such pay for a time not exceeding ninety days from his enlistment.

The *St.* of 1863, c. 38, ratifying contracts of towns to pay bounties to soldiers, does not operate to revive a contract which had become extinct under *St.* 1861, c. 222.

Receiving state aid will not prevent a soldier from recovering any sum to which he may be entitled under the votes of the town in which he enlisted.

CONTRACT brought by an inhabitant of Pembroke to recover bounty money voted by that town to enlisted soldiers. Judgment was rendered for the defendants in the superior court, upon agreed facts which are sufficiently stated in the opinion; and the plaintiff appealed to this court.

*J. K. Hayward*, for the plaintiff.

*B. W. Harris*, for the defendants.

GRAY, J. The vote of the town of Pembroke of May 3d 1861, upon which the plaintiff relies to maintain this action, was "that the sum of twenty-five dollars per month, including the army pay, be paid to each citizen of the town of Pembroke who shall enlist in the military service of the State of Massachusetts with the intention of serving in the army of the United States, if called upon during the present year, that the said amounts shall be paid monthly from the time they are accepted by the governor, and that the surplus revenue now held by the town in trust for the United States be appropriated to defray the expenditure." The defendants contend that this vote was not justified by the third article in the warrant calling the meeting at which the vote was passed. But the records of the meeting show that that article had been taken up and disposed of, leaving open the second, in which the purposes stated were, "to see

if the town will vote to appropriate a sum of money to aid the furnishing and equipment of volunteer military companies to be enlisted in this town and vicinity, and to take any necessary measures for the support of the families of those who are ordered to service, and act on anything relating to the above objects."

The first question to be considered therefore is, whether the vote above quoted was within this article in the warrant. And applying the liberal rules of interpretation which govern documents of this nature, we are of opinion that it was. A warrant issued by town officers for a town meeting is not to be construed with the same strictness as a power of attorney or a penal statute. If it gives intelligible notice of the subjects to be acted upon, it is sufficient. *Torrey v. Millbury*, 21 Pick. 68. *Haven v. Lowell*, 5 Met. 40, 41. Gen. Sts. c. 18, § 22. "Furnishing volunteer military companies" would be quite as generally understood to include the raising of men, as to be limited to the arming and equipping of men when raised. If "furnishing" meant no more than that, it might as well have been omitted, for "equipments" would have sufficed without it. And to "act on anything relating to the above objects" might reasonably be held to include obtaining the soldiers themselves, as well as fitting them out and providing for their families.

On the 6th of May 1861, the plaintiff and sixty-two others presented a petition to the governor, pursuant to the Gen. Sts. c. 13, § 14, in which they agreed to be enrolled into a company of volunteer militia to be raised in this and neighboring towns, subject to his orders, and to serve for the period of five years unless sooner discharged agreeably to law, adding, "and this enlistment we enter into with the full understanding that we are liable to be ordered into active service under the government of the United States." The governor thereupon on the 7th of May authorized the petitioners to organize themselves into a company of infantry, and ordered an immediate election of officers, which was had the same day, and a military company organized according to the then laws of the Commonwealth.

The plaintiff thus "enlisted in the military service of the State of Massachusetts with the intention of serving in the



army of the United States," and accepted the offer contained in the vote of the town, and made in form a complete contract with the town. This contract was indeed utterly void, because beyond the power of the town to make in the absence of legislation. *Tyler v. Pomeroy*, 8 Allen, 503, and cases cited. But it is not doubted that the legislature might make it good. *Fowler v. Selectmen of Danvers*, 8 Allen, 83, 84. *Freeland v. Hastings*, 10 Allen, 570. And on the 23d of May 1861 an act was passed, to take immediate effect, authorizing towns and cities to raise money "to defray any expense already incurred, or to carry out and fulfil any contract heretofore made with or in behalf of any of its inhabitants who may have enlisted as members of the volunteer militia, or who have been or may be called into the service of the United States;" providing that "all contracts now subsisting between any town or city and any member of the volunteer militia, as such, shall terminate in ninety days from the date of such contract, or the date of enlistment if subsequent to such contract and previous to the passage of this act;" and further declaring that "no compensation, in addition to the regular pay of the army or navy of the United States, other than that mentioned in the act, shall be given by any town or city to any of their inhabitants who as volunteers or otherwise shall enlist in the service of the United States; but all contracts made with any members of the volunteer militia who have been mustered into the service of the United States for the term of three months shall be valid during such term; and no pay shall hereafter be allowed by any town or city for the expense of drilling." *St. 1861, c. 222, §§ 2, 3.* By this statute the contract, previously subsisting in form only between the plaintiff and the town, was made valid for ninety days from the date of his enlistment as a member of the volunteer militia. That date was the 7th of May 1861, when this company was accepted by the governor and duly organized *Gen. Sts. c. 13, §§ 14, 17, 18.*

By the terms of the vote of the town, any of its citizens enlisting in the military service of the Commonwealth with the intention of serving in the army of the United States were to

be paid monthly from the time of their acceptance by the governor twenty-five dollars, "including the army pay." It is manifest therefore that the plaintiff's muster into the service of the United States on the 15th of June 1861, as a member of the Seventh Regiment of Volunteers, did not terminate his right to claim the bounty of the town, but only diminished the amount which he should thereafter recover of the town by the amount of the army pay received by him monthly from the United States.

The same statute of 1861, which ratified the contract of the town with the plaintiff, expressly declared that it should terminate in ninety days from the date of enlistment into the volunteer militia. The *St.* of 1863, c. 38, by which the contracts of towns to pay bounties for soldiers furnished by them are ratified and made valid, cannot be construed to revive contracts which had been put an end to by express statute, and had not since been renewed by the town. The contract originally made between the plaintiff and the town having been ratified and continued in force for a limited time, and then terminated, by the *St.* of 1861, there is no ground for implying a new contract beyond that time in face of the express prohibition of that statute, and there was therefore no form of contract between the plaintiff and the town, to which the *St.* of 1863 could apply.

The state aid which the plaintiff's family have received from the treasury of the town under the statutes of the Commonwealth is in no sense a payment of or substitute for the sum which the town had promised to pay to him individually. And it has not been suggested by the town that the bounty received by the plaintiff from the United States is to be considered as "army pay" under the vote of the town.

The result is therefore that the plaintiff is entitled to recover at the rate of \$25 a month for ninety days from the 7th of May 1861, deducting the monthly pay received by him from the United States after the 15th of June 1861, and within that period.

*Judgment for the plaintiff accordingly.*

## ALBERT W. CURTIS vs. INHABITANTS OF PEMBROKE.

A citizen of a town who enlisted in the military service of the United States after a promise of the town to pay a monthly sum to each citizen thereof who should so enlist had been terminated, under *St.* 1861, c. 222, § 2, by the lapse of ninety days, cannot maintain any action against the town to recover the bounty so voted.

CONTRACT brought by an inhabitant of Pembroke to recover bounty money voted by that town to enlisted soldiers. Judgment was rendered for the defendants in the superior court, upon agreed facts which are sufficiently stated in the opinion and the plaintiff appealed to this court.

*J. K. Hayward*, for the plaintiff.

*B. W. Harris*, for the defendants.

GRAY, J. This plaintiff's claim is founded upon the vote quoted in the opinion in the next preceding case. *Grover v. Pembroke*, ante, 88. But this case is essentially different from that. The plaintiff produces no evidence whatever of any contract by the town with him or of any action of the town by which he was induced to become a soldier. He never enlisted in the militia at all, and his enlistment into the service of the United States was nearly four months after this vote was passed by the town, and three months after the *St.* of 1861, c. 222, took effect. Upon any possible construction, no contract, or form of contract, had been made between him and the town when that statute went into operation. No such contract was therefore ratified by that statute. All similar contracts for the future were absolutely prohibited by it. And the town never renewed its offer afterwards. If it had done so, and the plaintiff had accepted the offer, their express contract might have been ratified by the *St.* 1863, c. 38. But we cannot imply such a contract in the absence of proof. It is more reasonable to suppose that both the town and the plaintiff understood the offer contained in the vote of the town to be withdrawn or annulled by the *St.* of 1861. The reasons on which we have held in *Grover's case* that a contract which once existed in form, and had been terminated by the *St.* of 1861, was not revived by the *St.* of 1863 apply with increased force to this case.

*Judgment for the defendants.*

**EDWARD JAMES vs. INHABITANTS OF SCITUATE.**

If prior to St. 1861, c. 222, a town had voted to pay to each volunteer soldier raised and being an inhabitant therein and mustered into the service of the United States for the defence of the government a certain sum per month, and also "that each volunteer soldier belonging to this town be allowed one dollar per day for each and every day he is drilled under proper authority," and an inhabitant in pursuance thereof signs a paper enrolling himself with others into a company of volunteer militia for five years, "with the full understanding that we are liable at any moment to be ordered into active service under the government of the United States," and is drilled for several days under proper authority, and shortly afterwards enlists in the military service of the United States, he may under that statute maintain an action against the town to recover such pay for a time not exceeding ninety days from his enlistment, and also for the time spent in drilling.

An enlisted soldier can maintain no action against a town to recover money for a uniform, under a vote of the town appointing a committee "to expend for each enlisted soldier a sum of money not exceeding ten dollars for a uniform."

CONTRACT brought by an inhabitant of Scituate to recover bounty money voted by that town to enlisted soldiers, and also for a uniform, and also to recover for time spent in drilling while enrolled in a company of volunteer militia.

It was agreed in the superior court that at a town meeting held on the 4th of May 1861 the town passed the following votes, under articles in the warrant authorizing them to do so: "Voted, to pay to each volunteer soldier raised in this town and being an inhabitant therein and mustered into the service of the United States for the defence of the government the following sums, to wit: to each soldier (except commissioned officers and first and second sergeants) so mustered and enlisting, and having a family, fifteen dollars per month in addition to the sum allowed by the United States per month and during such service, and to each soldier not having a family the sum of ten dollars per month for like service. Voted, that a committee of seven be appointed and they are hereby instructed to expend for each enlisted soldier being an inhabitant of this town a sum of money not exceeding ten dollars for a uniform. Voted, that each volunteer soldier belonging to this town be allowed one dollar per day for each and every day he is drilled under proper authority." A vote was also passed, naming the committee above referred to.

On the 20th of May 1861 the plaintiff with about sixty others signed a paper agreeing "to be enrolled into a company of volunteer militia, to be raised in the towns of Scituate, Marshfield and vicinity, subject to orders of the commander-in-chief; and in consideration of arms and equipments to be furnished us by the Commonwealth we do hereby agree to serve for the period of five years, unless sooner discharged agreeably to law, and this enlistment we enter into with the full understanding that we are liable at any moment to be ordered into active service under the government of the United States;" they were accepted by the governor on the 21st of May, and soon afterwards met and elected officers and organized themselves as a military company, according to the laws of the Commonwealth. On the 10th of June, after the plaintiff had spent five and one half days drilling under authority of the captain of his company, notice was given that this company could not be included as a company in one of the regiments of United States volunteers, and thereupon on the 15th of June the plaintiff enlisted in the military service of the United States, as recited in the opinion.

Upon these facts judgment was rendered in the superior court for the defendants; and the plaintiff appealed to this court.

*J. K. Hayward*, for the plaintiff.

*B. W. Harris*, for the defendants.

GRAY, J. The vote of the town of Scituate of May 4th 1861 "to pay to each volunteer soldier" (except officers of a certain rank) "raised in this town and being an inhabitant therein and mustered into the service of the United States for the defence of the government," namely, "to each soldier so mustered and enlisting, and having a family, fifteen dollars per month in addition to the sum allowed by the United States per month and during such service," took, when accepted by the plaintiff, the form of a contract between him and the town, which the legislature afterwards confirmed for the period of ninety days from his enlistment in a militia company on the 21st of May 1861, and then terminated. *Grover v. Pembroke*, ante, 88. The only question under this vote, not covered by the opinion in that case, arises upon the following facts: Upon the 10th of June

1861 the plaintiff and other members of this company received notice through their captain by an order of the governor that they could not be included as a company in one of the regiments of United States volunteers, nor as one of the companies to be placed in camp under the *St.* of 1861, c. 219; but that any of its members who would sign a new enlistment roll might be included in one of the regiments of volunteers then being raised for the United States service. The plaintiff signed such an enlistment roll, and was mustered into the service of the United States on the 15th of June. It is now contended on the part of the town that the plaintiff did not enter the service of the United States under his original enlistment into the militia of the Commonwealth, or as a member of a company of the militia, but solely under his new enlistment directly into the service of the United States, which he was under no obligation to enter into, and that he does not therefore come within the terms of the vote of the town. But there is no ground for such a restriction of those terms. The plaintiff brings himself within the very words of the vote. He was a "volunteer soldier, raised in this town, and an inhabitant therein, and mustered into the service of the United States for the defence of the government." This vote, which followed the words of the corresponding article in the warrant, was not limited to those already mustered into the United States service, or who had put themselves into a position in which they could not avoid being so mustered in. The question now before the court is not of the completion of the contract between the plaintiff and the United States, but between the plaintiff and the town. The town offered him a bounty if he would volunteer and be mustered in. He accepted the offer by entering into an organization of militia which was liable to be called into the national service. The contract thus made between the plaintiff and the town was ratified by the legislature. When the government called for men in the form of volunteer regiments, instead of militia companies, he carried out his contract with the town, according to its spirit and purpose, to the best of his ability, and he had a right to rely upon that contract to the extent to which it had been so ratified by statute. He is

therefore entitled to recover at the rate of fifteen dollars a month, for ninety days, under his first count.

Under his second count, he can recover nothing; for the town never promised to pay him anything for a uniform, but simply appointed a committee "to expend for each enlisted soldier being an inhabitant of this town a sum of money not exceeding ten dollars for a uniform." The object was not to pay him ten dollars, but to see that he had a uniform, and if he obtained a uniform from the United States or any other source, or for any other reason the committee did not see fit to expend ten dollars for a uniform for him, the town was not bound to pay him ten dollars. The case in this respect falls within the principle of *Williams v. Plymouth, ante*, 86.

The plaintiff's claim under the third count for five days and a half drilling within a month after his enlistment into the volunteer militia stands upon the same ground as his claim for bounty during the ninety days next succeeding that enlistment. The promise of the town, "that each volunteer soldier belonging to this town be allowed one dollar per day for each and every day he is drilled under proper authority," was one of the considerations on which he enlisted. It was within the scope of the articles in the warrant "to raise and appropriate such sums of money as may be necessary or proper to carry out any or all of the above purposes or any other purpose deemed expedient for arming and equipping soldiers of this town called into the service of the United States;" and "to act and do anything in relation to the above." *Grover v. Pembroke, ante*, 88. It is agreed that he was drilled under the proper authority of the captain of his company of militia. It does not appear, and is not material, whether any part of this drilling took place before the passage of the *St. of 1861, c. 222*. The provision of § 3 of that statute, that "no pay shall be hereafter allowed by any town or city for the expense of drilling," clearly prohibits only the making of such contracts for the future, and does not prohibit the performance of contracts ratified by that statute, and on the faith of which soldiers had enlisted.

*Judgment for the plaintiff accordingly.*

## PHILIP D. KINGMAN &amp; another vs. LORING TIRRELL.

A party who has refused, at the trial of a case, to produce, on notice, a paper in his possession, cannot be allowed to introduce it in evidence, after secondary evidence of its contents has been introduced by the adverse party; nevertheless a new trial will not be granted on account of his being allowed to introduce it in evidence under these circumstances, if it appears that the adverse party was not prejudiced thereby.

One who puts in evidence a note with indorsements may show that the indorsements were not correct.

In an action by the assignees of an insolvent debtor to recover back instalments of money paid by the debtor, by way of preference, to a preëxisting creditor, at several times after an urgent demand of payment by the latter, a verdict for the defendant will not be set aside because the judge refused to rule, as matter of law, that the debtor's failure to pay the note at or about the time he was called on to do so, and his continued failure to pay it, constituted insolvency, and were sufficient "reasonable cause," within the meaning of the statute, to lead the creditor to believe him insolvent; or to rule that the plaintiffs must satisfy the jury that the defendant had reasonable cause to believe that the debtor intended to prefer him.

CONTRACT brought by the assignees of Caleb Poole, Jr., an insolvent debtor, to recover back payments made by him to the defendant, upon a promissory note, in violation of the provisions of the insolvent law. The answer admitted the existence and set forth a copy of a note of \$500, given by Poole to the defendant, dated May 7th 1861, with indorsements thereon, amounting to \$400, to wit, \$200 indorsed on February 27th 1863; \$100 on March 1st 1863; and \$100 on March 7th 1863; and averred that a portion of the amount of \$200 was really paid in July 1862, and denied that these payments were made or received in violation of the insolvent laws.

At the trial in the superior court, before *Rockwell, J.*, the plaintiffs called on the defendant for the note referred to, having previously given him notice to produce it; but the defendant declined to produce it, assigning no reason therefor. The plaintiffs were therefore obliged to call Poole, who testified that he gave the note, and made payments thereon as follows: in November 1862, \$50; in December 1862, \$50; about March 1st 1863, \$100; and afterwards, in March 1863, two payments he thought of \$50 each. He also testified to facts showing that he was then, and long before, deeply insolvent, but insisted that he did



not then know that he was insolvent, and did not make either of the payments in contemplation of insolvency. Poole's petition in insolvency was filed on the 7th of April 1863; and it appeared that some of his bills for goods bought in Boston in the course of his business as a trader were overdue during six months prior to that date, and that he was occasionally called on for payment thereof. The plaintiffs also proved that in July 1862 the defendant said to Poole, with considerable earnestness, "that note had better be paid;" and that thereupon Poole promised to pay it as soon as he could. Poole testified that he paid \$100 soon afterwards.

The defendant, in opening his case, was about to read the note to the jury. The plaintiffs objected, but the objection was overruled. The note bore indorsements as set forth in the answer. The defendant was allowed to testify, under objection, that a portion of the sum of \$200, indorsed February 27th 1863, was paid more than six months prior to the filing of the petition in insolvency.

The plaintiffs asked the court to instruct the jury that Poole's failure to pay the note at or about the time when the defendant called upon him to do so, or at least that his continued failure to pay it, as hereinbefore stated, constituted insolvency, and was sufficient "reasonable cause," within the meaning of the statute, to lead the defendant to believe him insolvent. The judge, instead of so ruling, instructed the jury that the plaintiffs must also satisfy them that the defendant had reasonable cause to believe that Poole intended to prefer him; and that the fact alone of Poole's failure to pay, under the circumstances stated, would not prove that Poole intended to prefer him.

The jury returned a verdict for the defendant, and the plaintiffs alleged exceptions.

*J. B. Harris*, for the plaintiffs.

*P. Simmons*, for the defendant.

HOAR, J. 1. We understand the rule of practice to be well settled, that if a party who has had notice to produce a paper at the trial refuses to do so, and the other party introduces secondary evidence of its contents, the party so refusing cannot

afterwards produce the paper in evidence, either to contradict such secondary evidence, or in support of his own case. *Doe v. Cockell*, 6 C. & P. 525, 527. *Doe v. Hodgson*, 12 Ad. & El. 135. 1 Greenl. Ev. (10th ed.) § 560, n. 3. And the rule seems to be a just and reasonable one. It should not be permitted to a party to compel his adversary to avail himself of imperfect means of establishing a fact, the best evidence of which he chooses to prevent him from using; and then to avail himself of the proof which makes all other evidence useless. Any other rule would make it for the interest of a party in all cases to withhold important documents, with the certain reliance that he could in no event be prejudiced, and with a chance of obtaining an unfair advantage. For if the secondary evidence should prove the contents of the paper with complete exactness, the case would stand as well as if it had been produced. If it tended to show something more unfavorable to the other party than the exact truth would have done, the subsequent production of the paper itself would control and do away with the effect of it. And if the evidence fell short of establishing all which the paper contained adverse to the interests of the party who had it in his possession, he could allow the jury to be misled, and gain an advantage from evidence which he knew to be untrue.

But though the admission of the note in evidence for the defendant, after he had been notified by the plaintiffs to produce it, and had refused to do so, was irregular, it gives the plaintiffs no just ground of exception, unless it appears that they were prejudiced by it. *Burghardt v. Van Deusen*, 4 Allen, 374. *Hackett v. King*, 8 Allen, 144. The purpose of granting a new trial is not to obtain mere theoretical accuracy, but to secure substantial justice. And on examining the case carefully, we do not find that the plaintiffs were injured by the production of the note. They complain that they were obliged to call an adverse witness; but that was because the note was withheld, not because it was afterward shown to the jury. The plaintiffs wished to prove that payments were made upon the note within six months of the insolvency of the promisor; and to do this,

they wished to use the indorsements upon the note. The defendant had previously given a copy of the note, and set forth the indorsements upon it truly, in his answer. The note, when produced, tended to establish the fact which the plaintiffs sought to establish. It was better evidence for them than the evidence of their witness, and its production was a benefit rather than an injury.

2. That the defendant was not precluded from showing that the indorsements upon the note were not correct, because he had used it in evidence, is too plain to require the citation of authorities. The indorsement upon a note of payments of money is merely a receipt, and open to explanation or contradiction by parol.

3. The exception taken to the instructions given to the jury cannot be sustained. The failure of Poole to pay the debt due to the defendant would not necessarily, as a matter of law, constitute insolvency, or be notice to the defendant of insolvency; although it would be evidence tending to show it. And the instruction that the plaintiffs, in order to avoid the payments made upon the note, and recover them from the defendant, must not only show that they were made when the debtor was insolvent or in contemplation of insolvency, and when the defendant had reasonable cause to believe it, but also that the defendant had reasonable cause to believe that the debtor intended a preference, although not true as an abstract statement of the law, was correct as applied to the evidence in the case. The statute provides that, to avoid such payments, the defendant must have had reasonable cause to believe that they were made in fraud of the insolvent law, or in violation of its provisions. Gen. Sts. c. 118, §§ 89, 91. But the only violation of the provisions of the insolvent law which the plaintiffs charged or attempted to prove, or of which there was any evidence, was an intention to prefer the defendant. There was, therefore, no substantial error in directing the attention of the jury exclusively to that.

*Exceptions overruled.*

## LEANDER LOVELL vs. WILLIAM H. NELSON.

A survivor of two joint debtors, who pays a joint debt after the expiration of the time when the creditor could have enforced it against the administrator of the estate of the deceased, does not thereby entitle himself to maintain a claim for contribution from such administrator, or to avail himself thereof in set-off, in an action brought against him by such administrator.

If a defendant pleads in set-off, the burden of proof is upon him to show that his claim filed in set-off is due from the plaintiff in the same right with the cause of action declared on in the writ; and if the plaintiff describes himself in the writ as administrator of the estate of a deceased person, and declares upon a promissory note signed by only one person, and running to him as administrator of that estate, this will not be sufficient to afford a presumption that his claim is in his representative capacity.

CONTRACT brought by the administrator of the estate of Alonzo Scudder against the administrator of the estate of Richard W. Holmes, upon a promissory note signed by said Holmes, dated October 3d 1861, for \$709.26, payable on demand with interest, to "Leander Lovell, administrator on the estate of Alonzo Scudder." The writ was dated January 23d 1864. The defendant filed a declaration in set-off, claiming to be allowed for a balance found due from Scudder upon his books, at his death, to Holmes, for one half of certain sums paid by him within one year past on account of debts for which Scudder & Holmes were jointly liable; and for one half of the amount paid by him in December 1863 upon a bond to the Old Colony Insurance Company, dated in July 1845, and signed by Scudder & Holmes. The plaintiff replied, amongst other things, that these claims were barred by the statute of limitations.

The case was submitted, in the superior court, upon the report of an auditor, who found that Scudder died in April 1853, having before that time been in partnership with Holmes, and the plaintiff was appointed administrator of Scudder's estate on the 8th of August in that year; and that Holmes died in February 1862, and the defendant was duly appointed administrator of his estate. Certain other facts were found, which are sufficiently stated in the opinion.

Judgment was rendered in the superior court for the plaintiff, and the defendant appealed to this court.

*C. G. Davis*, for the defendant.

*E. Ames*, for the plaintiff.

BIGELOW, C. J. It seems to us that there are two decisive answers to the defendant's claim in set-off.

The first is the statute of limitations. Assuming that the note declared on can be properly deemed to belong to the estate of the plaintiff's intestate, and so to be due in the same right with the claims filed in set-off, nevertheless the latter are barred by the lapse of time. The plaintiff was appointed administrator on the 8th day of August 1853, and filed his bond on that day. He also gave due notice of his appointment in compliance with the order of the probate court, according to the provisions of Rev. Sts. c. 66, § 1, which were then in force. By section third of the same chapter it was provided that no administrator, after having given notice of his appointment as required by law, should be held to answer to the suit of any creditor of the deceased, unless it was commenced within four years from the time when he gave bond as administrator. By Gen. Sts. c. 97, § 5, this limitation is reduced to two years. Two of the items of set-off are claims arising out of the partnership dealings and contracts which existed between the plaintiff's intestate and the defendant's intestate, being debts of the firm paid by the latter after the decease of the former. These were clearly barred, and could not have been enforced by the original creditors of the firm as against the estate in the hands of the plaintiff as administrator at the time they were paid by the defendant. The latter by such payment did not acquire any new cause of action against the plaintiff's estate to which the statute bar would not apply. Any balance which might have been due to the defendant's intestate on a final settlement of the partnership concerns between him and the plaintiff's intestate was barred after the lapse of four years from the appointment of the latter as administrator, and could not be revived by a payment of a partnership debt by a surviving copartner.

The other item of set-off is a payment of money in satisfaction of a bond on which the plaintiff's intestate was liable jointly with the defendant's intestate. It is true that the payment was

made after the death of the plaintiff's intestate, and within two years from the time when the plaintiff's action was commenced. But this does not create any new cause of action, or render the plaintiff as administrator liable after the expiration of the time limited for bringing actions against him. If no cause of action accrued on which the defendant could be held liable as administrator within four years after his appointment, he cannot afterwards be chargeable on a cause of action subsequently accruing against the estate of his intestate. The statute bar is absolute, except when new assets come to the possession of an administrator after the period of limitation has expired, and in cases in which the judge of probate has required him to retain assets to satisfy claims of creditors whose cause of action did not accrue within such period. *Holden v. Fletcher*, 6 Cush. 235.

It is suggested by the defendant's counsel that the statute of limitations in favor of executors and administrators is only applicable to actions brought by the creditors of deceased persons, and cannot be pleaded in answer to claims filed in set-off. But this suggestion is fully met by the provision in Gen. Sts. c. 130, § 18, which enacts that in cases of set-off, if any limitation of actions is alleged by way of defence to the defendant's demand, the limitation shall be applied in the same manner as it would have been to an action brought on the same demand if it had been commenced at the time when the plaintiff's action was commenced. The present suit was commenced long after all the claims filed in set-off against the estate of the plaintiff's intestate were barred by lapse of time.

Another and complete answer to the claims filed in set-off is, that none of them appear to be due in the same right with the note declared on. The burden of proof is on the defendant to show this. But the evidence fails to establish the fact. It is true that the note is made payable to the plaintiff as administrator, and he is so described in the writ. But this circumstance is by no means decisive. It may nevertheless be the property of the plaintiff in his own right, and the money may be due to him personally, and not in his representative capacity. To be liable to the defendant's set-off, the note in suit must be shown

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to be a debt due to the estate of the plaintiff's intestate. An executor or administrator, in lending money belonging to the estate to an individual on his promissory note only, is not acting in the execution of his trust. Such a use of the trust funds in his hands, except under unusual and extraordinary circumstances, would be inconsistent with due and faithful administration, and he would be chargeable with the money so lent, whether it was repaid by the borrower or not. In making such a loan, therefore, the inference is that the debt is his own personal demand, and that a promise to him as executor or administrator is rather a *descriptio personæ* used to indicate the fund from which the money was taken and to which the promisee is indebted, than as evidence that the debt is due to him in his representative capacity. *Grew v. Burditt*, 9 Pick. 265, 271. But in the present case it appears affirmatively that the plaintiff, prior to the commencement of the present action, settled his first account of administration of the estate of his intestate, and fully accounted for the whole estate in his hands. In this state of the evidence, we are of opinion that it does not appear that the note declared on is due in the same right with the demands filed in set-off, and that the latter cannot be alleged by way of defence to the plaintiff's claim.

*Judgment for the plaintiff.*

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#### MERCY O. POWELL & another vs. JOSEPH JENNY.

If partition is decreed, upon a petition for partition, against the opposition of the respondent, the costs to be taxed against the latter, under Gen. Sts. c. 136, are limited to the costs accruing between the filing of the answer and the rendering of the verdict.

PETITION for partition. The respondent filed an answer, denying the petitioners' title, and claiming title in himself. The case was submitted to a jury at October term 1862, who returned a verdict in favor of the petitioners. Commissioners were thereupon appointed to make partition, and estimate the value of improvements claimed to have been made by the

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respondent, in November 1864; and their report, made at February term 1865, was accepted at June term 1865. The clerk taxed full costs for the petitioners, from the commencement to the end of the case, including the fees of the commissioners and the warrant for partition; and, on appeal to the superior court, this taxation was revised by striking out the two items referred to, and in other respects affirmed. Both parties appealed to this court.

*C. G. Davis*, for the petitioners.

*E. Robinson*, for the respondent.

COLT, J. In proceedings for partition in the common law courts, by Gen. Sts. c. 136, § 44, the costs are to be taxed in the usual manner, and the whole paid by the petitioner, except the costs of a trial of issues. By § 45 it is provided that when partition is opposed by any respondent therein named, and it appears that the petitioner is entitled to have partition as prayed for, he shall recover costs against the party opposing, from and after the filing of the plea or answer, to be taxed as in other civil cases. The petitioners now claim that under this provision they are entitled to tax all the costs which accrued from the time of the filing of the answer of the respondent until the termination of the case. These sections are to be construed in connection with § 19, which provides that if upon trial of an issue it appears that the petitioner is entitled to have partition as prayed for, he shall recover his costs of such trial against the party who objected thereto, and shall have execution therefor. And we are of opinion that it was the intention to limit the claim of the petitioner, upon the party opposing, to such costs only as accrue from the time of the filing of the answer until the issue is disposed of by verdict of the jury or otherwise. In this case the principal part of the costs taxed was for items which accrued after the verdict of the jury in favor of the petitioners. It cannot be supposed, without a clearly expressed provision, that the legislature intended to impose costs upon a party who is virtually out of court, and after he has ceased opposition. All costs so imposed would be in the nature of a penalty upon him for failing to maintain the issue; and more or less heavy as the petitioner



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might choose to keep the proceedings in court for a longer or shorter time. In this case it appears that, though the verdict of the jury was rendered against the respondent in October 1862, yet the warrant for partition was not taken out till November 1864. *Dudley v. Adams*, 5 Allen, 96.

It was contended that in this case the issue was not disposed of by the verdict of the jury, because the respondent claimed compensation for improvements under § 46; and the commissioners who were appointed to make partition were also appointed to estimate the value of such improvements. It does not appear by what authority this duty was devolved upon the commissioners. Such claims for improvements are to be tried and disposed of as provided for tenants in real actions, by Gen. Sts. c. 134, and by reference to those provisions it will be seen that this claim must be passed upon by the jury to which the main issue is submitted, unless the court on motion postpone the assessment of the sum due for improvements, in which case the assessment shall be made by the court or by another jury. It is probable that the parties assented to this arrangement; but if they did, it would not be in the power of the court to apportion the charges of the commissioners for the different services rendered by them, so as to vary the rule above stated.

The taxation of the superior court must therefore be revised in accordance with these views, so that such costs only may be allowed against the respondent as accrued between the time of filing the answer and the rendering of the verdict of the jury upon the issue made.

## DAVID DOWE vs. EVERETT J. SMITH.

A claim for necessities furnished to a married woman during the time while she was prosecuting a libel for divorce is not discharged by a decree of court granting the divorce and allowing alimony to her for her past and future expenses; although the person who furnished the necessities was her father, and the libel for divorce was prosecuted under his direction.

CONTRACT brought to recover for necessities furnished to the defendant's wife, consisting chiefly of board, clothing, and money paid for medical attendance, from July 1st 1863 to May 12th 1864. The answer set forth that on or about the 1st of July 1863 the defendant's wife left him against his will and went to the plaintiff's house and there resided until the commencement of this action; that under the advice of the plaintiff, who is her father, she filed a libel for divorce from bed and board, for cruelty, which libel was prosecuted under the plaintiff's direction, until at May term 1864 she had judgment in her favor for a divorce, and it was decreed that the defendant should pay to her fifty dollars as costs, and one hundred and fifty dollars for the expenses of the support of herself and child already incurred, and one hundred and forty dollars a year thereafter, in equal quarterly payments, all of which the defendant has duly paid. The plaintiff demurred to this answer, and the demurrer was sustained in the superior court, and judgment ordered for the plaintiff; and the defendant appealed to this court.

*E. Ames*, for the defendant.

*B. W. Harris*, for the plaintiff.

HOAR, J. The plaintiff's declaration is for necessities furnished to the defendant's wife and child during the time when she was prosecuting a libel for divorce. The answer, in substance, sets up as a defence that when the divorce was decreed, there was an allowance made to the wife, by order of the court, for her support while the libel was pending; and that the plaintiff assisted her in prosecuting the libel, and obtaining this allowance. This constitutes no legal defence to the action.

To maintain the action, the plaintiff must prove that the supplies were furnished to the wife upon the husband's credit; and

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Allen & others v. Inhabitants of Marion & others.

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that he authorized her to procure them, either directly, or by implication of law from leaving her without other means of support. This proof would show a debt due from the defendant to the plaintiff. That debt is not discharged by the wife's obtaining a decree that her husband should pay her a sum of money. The plaintiff has no means of making that fund available to him. The wife owes him nothing. He was not a party to the judgment; and there is nothing to show that whatever the wife had already obtained upon her husband's account was not considered by the court in fixing the amount to be paid to her. *Keegan v. Smith*, 5 B. & C. 375. That the plaintiff assisted her in her suit has no tendency to show that he agreed to discharge any debt which the husband owed him; and certainly does not estop him from claiming it. *Demurrer sustained.*



HENRY M. ALLEN & others vs. INHABITANTS OF MARION  
& others.

Under a statute providing that the profits of the alewife fisheries of a certain river should be paid into the treasuries of certain towns, in proportion to their respective valuations the towns have no authority to vote to distribute the money on the polls.

BILL IN EQUITY by ten tax-payers, and more, of Marion, setting forth that the towns of Marion, Rochester and Mattapoisett are, under the statutes incorporating said town, jointly interested in the profits of the herring fishery in Mattapoisett River, and that the share belonging to Marion has always heretofore been paid by the herring inspectors into the treasury of the town, and used for the general purposes of the town; but at a town meeting held in April 1865 the inhabitants have voted "that the herring money be distributed on the polls," which is an illegal disposition thereof. The prayer was for an injunction. The defendants filed a general demurrer, and the case was reserved for the determination of the whole court.

C. T. Bonney, for the defendants.

T. M. Stetson for the plaintiffs.

BIGELOW, C. J. By the act incorporating the town of Marion, St. 1852, c. 225, § 5, it is provided that the share or proportion of the net yearly profits of the herring or alewife fisheries of Mattapoissett River set apart for and belonging to Marion shall be paid into the town treasury. It is under this grant or privilege bestowed by the legislature and accepted by the town that the defendants have received and hold the money which is the subject of this suit. By virtue of the payment of the money into the treasury of the town under the provisions of the statute, it became part of the general funds of the town, to be appropriated and used only for such purposes as would come within the scope of legitimate municipal expenditures. It was not given to the town on any special trust, nor did they take it as absolute owners with an unfettered right of disposing of it for any object which a majority of the voters might select and determine. It was received for the use and benefit of all the inhabitants, and not for any class or portion of them, and can be expended in such manner and for such purposes as towns in their corporate capacity are authorized by law to use and appropriate money, and for no other objects whatever; that is, for such purposes as are recognized by law to be for the public benefit and advantage, and which will therefore enure to the use of all the inhabitants of the town. These are designated in Gen. Sts. c. 18, § 10. The general clause in the section which follows the enumeration of the specific objects for which towns may grant and vote money, and which authorizes them to appropriate it for "all other necessary charges arising in the town," does not give to the voters an unqualified *jus disponendi*. The right is limited to objects of a like character with those previously specified. It is a well settled rule in the construction of statutes, that general terms or expressions following a particular or special designation or enumeration of persons or things are to be taken to be applicable to those objects which are *ejusdem generis* with those comprehended within the specific words which precede the general clause.

It is too clear to admit of discussion that the vote of the town of Marion, set forth in the bill, by which the majority undertook

to dispose of the proceeds of the sales of fish which had been paid into the town treasury, does not grant money for any purpose such as towns are authorized by law to expend it. If, as we suppose, the intent of the vote was that the money should be distributed among the ratable polls, that is, should be paid out to those who were liable to a poll tax in the town, then it was in no sense a grant of money for a public object of expenditure, but was clearly an unequal and unjust as well as an illegal disposition of the money of the inhabitants. *Simmons v. Hanover*, 23 Pick. 181, 196.

The right of the plaintiffs, as tax-payers in the town, to maintain this bill to restrain such unlawful disposition of money in the town treasury is expressly given by Gen. Sts. c. 18, § 79.

*Demurrer overruled.*

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COMMONWEALTH vs. CHARLES F. NORTON.

If bounty money received by a minor upon his enlistment as a soldier is delivered by him to another to be carried to his father, and is embezzled, an indictment for the embezzlement may, under Gen. Sts. c. 172, § 12, allege the ownership of the money to be in the father.

INDICTMENT for embezzlement of four hundred and seventy-five dollars, in bank bills and United States treasury notes, the property of Clement Randall, and delivered by Charles H. Randall to the defendant to be carried to Clement Randall.

At the trial in the superior court, before *Rockwell, J.*, evidence was introduced tending to show that Charles H. Randall, who was a minor son of Clement Randall, enlisted as a soldier in the army of the United States at Portsmouth, New Hampshire, and received as part of his bounty money the bills and notes mentioned in the indictment, and delivered the same to the defendant to be carried to his father in Mattapoisett in this commonwealth; and that the defendant did not so deliver the same. The defendant objected that the ownership was not properly

alleged; but the judge ruled otherwise, and the defendant was found guilty and alleged exceptions.

*P. Simmons*, for the defendant.

*Reed, A. G.*, for the Commonwealth.

DEWEY, J. It is not necessary to decide the question of the strict legal rights between the father and his minor son as to money received by the son as bounty money for enlisting in the military service of the United States, and whether the father under his general right to the earnings of his son while a minor might hold the same against the will of the son, because the son voluntarily conceded such right, and sought to carry into effect the purpose to pass the money into the hands of his father. He placed these bank bills and United States treasury notes in the hands of the defendant to be delivered by him to the father. The defendant received them for that sole purpose, and thus holding them he unlawfully appropriated them to his own use. An action at law would, upon these facts, lie in the name of the father against the defendant for money received to his use. If A. delivers money to B. to be paid to C., and it is not paid, an action for money had and received lies by C. against B. This is upon the ground that the money thus received by B. belongs to the party to whom it was to be paid. The son might, in a case like the present, be considered the agent of the father, if that was necessary to authorize the allegation of property in these bills in the father. To avoid the effect of objections as to the allegation of ownership, the Gen. Sts. c. 172, § 12, declare that it shall be sufficient if it is proved on the trial that either the actual or constructive possession, or the general or special property, was in the person alleged to be the owner.

*Exceptions overruled.*

**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME JUDICIAL COURT**

**AT THE**  
**OCTOBER SESSION 1865, IN BOSTON.**

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**PRESENT:**

HON. GEORGE T. BIGELOW,	CHIEF JUSTICE.	
HON. CHARLES A. DEWEY,	}	JUSTICES.
HON. EBENEZER R. HOAR,		
HON. HORACE GRAY, JR.,		
HON. JAMES D. COLT,		

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**NORFOLK COUNTY.**

**THOMAS CURLEY vs. DANIEL L. HARRIS & others.**

One who is employed by a dealer in lumber to deliver lumber upon an unfinished bridge to sub-contractors who have undertaken to build the wooden portion thereof may recover damages against the contractors who have undertaken to build the entire superstructure, for an injury sustained by him while so delivering lumber, through a defect in the iron-work of that portion of the bridge which has been completed.

If one who has received a personal injury through the negligence of another signs a paper acknowledging the receipt of a small sum of money in full for his damages, a subsequent action cannot be maintained to recover damages for the same injury, unless his signature to the receipt was procured through mistake or fraud; and if instructions to this effect are requested, and the jury are simply instructed that if they are satisfied that the parties "fairly settled the claim it is sufficient, and the amount received in the settlement is not material to its validity as a settlement," a verdict for the plaintiff will be set aside.

**TORT.** The original declaration was as follows:

"And the plaintiff says that on the first day of September

A. D. 1862, at Boston in the County of Suffolk, the defendants by their servants were constructing a bridge; and that said bridge was negligently and improperly constructed, and that the defendants did not use due care in the construction of the same; and that as the plaintiff was passing upon the same, having a lawful right to be upon the same, and being then in the exercise of due care, said bridge, by reason of the defendants' negligence aforesaid, fell, and the plaintiff was violently precipitated to the ground, and struck and covered by the materials of said bridge. And the plaintiff further says that, by reason of the defendants' negligence aforesaid, he sustained severe internal and external bruises," &c.

The plaintiff obtained leave to file an amended declaration, which was like the original except in alleging that the plaintiff was employed to deliver lumber upon said bridge, to be used in the construction of the same, and had a lawful right to go upon and use said bridge, and on the day and year aforesaid went upon the bridge for the purpose of delivering said lumber.

The answer denied the allegations of both declarations, and averred that the cause of action, if any, had been settled.

At the trial in the superior court, before *Rockwell, J.*, it appeared that the defendants, who were civil engineers and bridge-builders, contracted with the Boston and Providence Railroad Company, for a specified sum, to build the superstructure of a bridge over their railroad where Berkeley Street crosses it in Boston, according to certain plans and specifications furnished by the defendants; that the superstructure was of iron, with the exception of the floor timbers and planking; that one Nowell contracted with the defendants, for a specified sum, to furnish and put the woodwork on to the bridge; that Nowell purchased the lumber of Pope & Shepard, by whom the plaintiff was employed as a teamster; that, on the day of the injury to the plaintiff, three sections of the bridge had been erected, and one of them planked; that by the direction of Nowell the plaintiff drove with a load of lumber on to the section which had been planked, whereupon the entire bridge fell, and the plaintiff with it, and he then received the injury complained of. The bridge



was a truss bridge, consisting of an upper and lower chord, connected by posts, braces and counter braces. Neither of the defendants had been to the bridge for a week before it fell.

Nowell testified that, at the time he made the contract for the woodwork, he understood one of the defendants to say that as one span was completed the lumber for the next was to be driven upon the bridge; that each span was as strong by itself as the whole bridge; and that after the bridge fell the defendants found no fault with his management in driving the team upon the bridge. This testimony was not contradicted.

The only defect alleged to exist in the bridge was in the upper chord, composed partly of cast iron and partly of wrought iron; and there was evidence tending to show that this was too light. The defendants introduced evidence tending to show that it was sufficient in size, and larger than was in common use elsewhere in similar bridges, approved by competent engineers and bridge-builders.

After the fall of the bridge the defendants instructed Nowell to ascertain and settle for them the claims for damage; and Nowell instructed Shepard to settle with the plaintiff. Shepard testified that in October 1862 he told the plaintiff that the defendants wished to know what his claim was, and to settle it, and that the plaintiff said all he wanted was pay for his lost time and his doctor's bill; and afterwards, on the 16th of January 1863, Shepard and the plaintiff had a settlement, and Shepard paid the plaintiff \$34.65, in addition to other sums which had been paid to him for wages and lost time, and took the following receipt: "Dorchester, January 16, 1863. Received of Pope & Shepard thirty-four  $\frac{1}{10}$  dollars, in full for services to January 1st, and in full for damages on railroad bridge in Boston. Thomas Curley." Shepard received money from the defendants, though not quite enough to pay for the plaintiff's lost time and the doctor's bill; and he paid the balance from his own money. The plaintiff denied all recollection of the interview with Shepard in October, and denied that he knew what the receipt contained or that he could read or write more than his own name; and he testified that he supposed the money

paid to him came from Shepard, and not from the defendants, and that he did not understand that he was settling any claim for damages. The defendants, however, introduced evidence tending to show that the receipt was read over to the plaintiff before he signed it.

The defendants requested the court to instruct the jury as follows:

"1. The declaration sets forth no legal cause of action.

"2. If the defendants contracted with the railroad company to build the superstructure of the bridge according to certain plans, specifications and models, the company furnishing the substructure, and had put up two or three sections in accordance with such plans, specifications and models, and the defendants contracted with Nowell to furnish and put on the planking, by an entire contract, and Nowell contracted with Pope & Shepard to furnish the lumber for the planking, and the plaintiff, employed by Pope & Shepard, was engaged in driving a load of lumber upon the sections of the bridge which had been put up, and the bridge fell, the defendants are not liable, though the superstructure was defective in design, though they had furnished the design for the superstructure, and though they had, at the time of making the contract with Nowell, some time before the bridge was erected, expressed the opinion that the lumber for the planking might be driven on to the bridge as it progressed; and it makes no difference with their liability that they told Nowell, after the accident, that he had done right in driving on to the bridge.

"3. The fact that the bridge fell is not of itself any evidence, under the circumstances of this case, of negligence on the part of the defendants.

"4. If the defendants, being engineers and bridge-builders, of competent skill and experience to build a bridge for the place, adopted a design for the bridge approved by their best skill and judgment, and the design proved insufficient, they are not responsible to the plaintiff for a mere error of judgment.

"5. In testing the materials or the bridge, the defendants were only required to use that degree of care which careful and

competent engineers and bridge-builders ordinarily use in such cases.

"6. If the bridge, in the state in which it was, was sufficient, so far as the ordinary skill and care of competent men for the business could determine, to sustain the load driven upon it, the defendants are not liable, although the bridge might not have been sufficient for the purpose for which it was ultimately designed.

"7. If the bridge was substantially such as are in common use for similar purposes, and generally approved by competent men, the defendants are not liable.

"8. If Nowell did not use ordinary care in driving or directing the driving of the lumber upon the bridge, in the state in which it was at the time, the defendants are not liable.

"9. If the defendants built a bridge according to the design and plans furnished, and according to the size and of the quality contracted for with the railroad company, and the bridge fell solely because the upper chord was not large enough, or was made of cast iron, the defendants are not liable under the circumstances of this case; certainly not, if they had no reason to believe, and did not believe, or as experienced and competent engineers and practical bridge-builders, in the exercise of proper care and prudence, knew of no cause for apprehension of danger.

"10. If the receipt was read over to the plaintiff by Shepard, and the plaintiff signed it, receiving the money, it is binding as a settlement, although the jury may think he did not get enough, and although he did not sufficiently take into view any possible or probable future injuries.

"11. The receipt and settlement shown by him are binding if the money was paid and kept, in the absence of fraud. The jury have nothing to do with the adequacy of the money paid. The plaintiff has no right to more than one satisfaction, nor any for future sufferings, if he afterwards suffered more than he expected at the time of the settlement.

"12. If he knew what the paper said he is bound by it, even if not understanding the legal effect, in the absence of fraud."

The judge declined to give these instructions, and instructed the jury, amongst other things, as follows :

“ There is nothing in the facts exhibiting such relations between the parties as to interpose a legal bar to the maintenance of this action.

“ To sustain his action the plaintiff must prove affirmatively that at the time of the injury he was in the exercise of due care on his part; that his own want of ordinary care did not contribute to the injury; and that the fall of the bridge was occasioned solely by the want of ordinary care on the part of the defendants. The plaintiff contends that the fall was caused by a defect in the construction of the bridge. The only evidence of defect which appears in the testimony is evidence tending to show that the top chord was deficient in size, and that it was composed partly of wrought iron and partly of cast iron. The plaintiff must therefore satisfy you, upon the whole evidence, that the fall of the bridge was caused by a defect in this top chord. If the defect was in the superstructure, and this defect was not the cause, the cause must have been a latent defect in the construction or material of the superstructure. For the consequences of such latent defect the defendants are not liable, unless it is shown that such latent defect was known to them, or that they, in any way, in the preparation of the iron, or in the construction of the structure, acted with a want of that ordinary skill and care which skilful and prudent builders of such structures should be reasonably expected to use.

“ If, therefore, the plaintiff proves that he received an injury from the fall of the section, he being in the exercise of due care, and that the fall was caused by a defect in the top chord occasioned solely by a want of ordinary care on the part of the defendants, he has a right to recover; otherwise not.

“ The mere fact that the bridge fell is not sufficient evidence, under the circumstances of this case, of negligence on the part of the defendants; but the plaintiff must further show that the defect which caused the fall was owing to their want of ordinary care.

“ The question here is, whether or not the defect caused the

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*Curley v. Harris & others.*

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injury in this case by reason of its being insufficient to sustain the burden and strain then actually upon it; and not whether the bridge, when completed, would or would not have been sufficient for the purpose of general travel for which it was ultimately designed.

"The plaintiff contends that this superstructure was either wholly or in part an experiment; which is contradicted by the defendants; and evidence has been introduced on both sides upon that subject. This evidence will be properly considered by the jury in its effect upon the case, and upon the question whether the defect causing the fall was in the top chord, but requires the statement of no particular principle of law. If there was evidence tending to show that the fall was occasioned in part by some defect in the substructure, connected with *no* negligence of the defendants, there would be no recovery against these defendants in this action; the cause must be solely the fault of the defendants.

"The declaration sets forth a legal cause of action. The defendants set up in their answer, and now insist upon a distinct ground of defence, namely, a settlement and payment. It is a question of fact for the jury upon the evidence whether there have been such settlement and payment. If there were, the plaintiff cannot recover. If the jury are satisfied that the parties, either by themselves or their authorized agents, fairly settled the claim, it is sufficient, and the amount received in the settlement is not material to its validity as a settlement."

The jury returned a verdict for the plaintiff, with \$539.58 damages; and the defendants alleged exceptions.

*A. A. Ranney*, for the defendants. As a general principle it must be conceded that in order to render the defendants liable they must have violated some obligation or omitted some duty which the law, under the circumstances of the case, imposed on them, as regards this plaintiff. But there was no privity whatever between the plaintiff and the defendants, nor was any invitation held out to him or the public to go upon the bridge. I was not then a highway or a private way. The defendants were bound to construct the bridge according to their contract,

and not otherwise and they were doing so. Whether the structure would be safe and convenient for a public highway when completed was a question for the determination of the other parties who were having the bridge built; and the responsibility must rest on them, and not on the defendants, who had no discretion in the matter. What the defendants said to Nowell, when the contract with him was made, must be regarded simply as the expression of an opinion, not controlling his action or connecting them in any way with him or his servants.

But if the defendants are held to have invited the plaintiff to go upon the bridge with his team, or stand in any such relation to him as is contended for, still they are not liable for the injury in question; but it must be regarded as a casualty arising from the risks incident to his employment. In the absence of an express contract, a master is not held to warrant the safety of the structure upon which a servant is employed or directed to go, nor the fitness or competency of other servants whom he may employ; but he is only required to exercise reasonable care and prudence in relation thereto. He must take proper care not to expose the servant to unreasonable danger. In the case at bar, the defendants cannot be held guilty of negligence, unless they knew or had reasonable cause to believe that the upper chord was too light. But they are not shown to have known or to have had reasonable cause to believe this. According to the best of their judgment, information and belief, as the result of experience, concurred in by other approved engineers, it was sufficient. If they were in error in this respect, it was the innocent error of a well informed judgment. Under these circumstances, there was no negligence. See *Ormond v. Holland*, El. Bl. & El. 102; *Tarrant v. Webb*, 18 C. B. 797; *Priestley v. Fowler*, 3 M. & W. 6; *Couch v. Steel*, 3 El. & Bl. 402; *Williams v. Clough*, 3 Hurlst. & Norm. 258; *Southcote v. Stanley*, 1 Hurlst. & Norm. 249; *Mad River, &c. Railroad v. Barber*, 5 Ohio State R. 541; *Addison on Torts*, 93, 94.

Specific instructions were asked for, and were required by the circumstances of the case, as to the settlement. The receipt

could not be controlled by parol evidence. *Brown v. Cambridge* 3 Allen, 474. The jury were misled by the instructions on this point.

*G. O. Shattuck & R. M. Morse, Jr.*, for the plaintiff.

BIGELOW, C. J. The defendants were clearly liable to the plaintiff in this action, if they were guilty of negligence in the construction of the bridge by the fall of which the plaintiff was injured. This liability rests on two grounds.

The first is, that there was evidence to show that the defendants, in making the contract for the woodwork of the bridge, stipulated that the lumber might be carried in teams on the different sections of the bridge as they were completed, and before the whole structure was finished, and that each span was as strong by itself as the whole bridge, when done, would be. This stipulation was equivalent to an agreement by the defendants with the contractors for the lumber and his servants that they would use due care in the construction of the bridge, so that each span would support in safety a team loaded with lumber.

The other ground is the more general one, that in the absence of any express stipulation there was an implied obligation or duty resting on the defendants that they would use due care in the construction of the iron work of the bridge, so that subcontractors under them and their servants employed on other parts of the work should not be exposed to risk of injury while engaged in the due course of their employment or service, by reason of any neglect or want of reasonable care on the part of the defendants in building that portion of the structure which was to be made and erected by them. The privity, so far as any is necessary to support the action, is found in the relation which subsisted between the parties at the time of the injury to the plaintiff growing out of the contract under which the work was done, and in the execution of which the plaintiff was injured. The object of this action is not to charge the defendants by reason of the fault or neglect of a third person or subcontractor, but for the omission of a duty or obligation which rested on the defendants themselves. A person in entering into

a contract takes on himself the usual and ordinary risks of the business in which he is thereby employed, including the negligence and carelessness of other persons who may be engaged in the same service or employment. For injuries which arise from such causes an employer cannot be held responsible in damages. But the law does not relieve him from all responsibility to those with whom he contracts. He is bound to use due care in the selection of those whom he employs to work in company with others, and to be reasonably diligent and cautious in obtaining proper materials, in the erection of adequate structures and in the procurement of suitable tools, machinery and other instrumentalities upon or by means of which an employment is to be carried on. *Witte v. Hague*, 2 Dow. & Ry. 33. *Randleson v. Murray*, 8 Ad. & El. 109. *Collett v. London & North Western Railroad*, 16 Q. B. 984. *Snow v. Housatonic Railroad*, 8 Allen, 441, and cases cited.

These principles were substantially recognized and adopted by the court at the trial. If the instructions on this part of the case are open to any criticism, it is that they are wanting in fulness; or rather, they are too abstract, and do not sufficiently meet the several aspects of the case on the evidence, as presented by the specific prayers for rulings submitted in behalf of the defendants. We are not prepared to say, however, that the defect or omission in the instructions affords sufficient ground for a new trial; nor is it necessary for us to determine this question, inasmuch as we are clearly of opinion that upon another ground the case must be tried anew, when an opportunity will be given for a fuller exposition of the rights and obligations of the parties growing out of their relations towards each other than was given on the former trial.

We think a substantial error was committed in the failure to give adequate instructions on the issue raised by the averment in the answer, that the plaintiff had settled for and received compensation from the defendants for the injuries which form the subject matter of the present action. The receipt signed by the plaintiff, in connection with other evidence of a settlement adduced at the trial, was *prima facie* sufficient to establish this



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*Curley v. Harris & others.*

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ground of defence; and it was incumbent on the plaintiff to rebut it by proof of some mistake or fraud. On this issue the defendants were entitled to insist that explicit instructions should be given to the jury; and these were asked for by their counsel. The jury should have been told that the presumption was that the plaintiff knew the contents of the paper which he signed, and that an acknowledgment in writing by him that he had received payment in full for the damages resulting from the accident was a complete defence to the action, unless he could show that he was deceived or mistaken in making the settlement and signing the receipt. The only instruction given on this point was, that if the parties "fairly settled the claim" it would be sufficient to bar the action. This was altogether too vague and uncertain to guide the jury in passing on the issue presented for their decision. It did not define what would constitute in legal effect a fair settlement. It left it for the jury to suppose that if, on the whole, they were of the opinion that the compensation which the plaintiff agreed to receive in satisfaction was inadequate or insufficient to indemnify him, they were at liberty to disregard the settlement, set aside the receipt, and render a verdict in his favor for additional damages. Nor did the remark of the court that "the amount received by the plaintiff in the settlement was immaterial to its validity" cure the defect. It left the door still open for the jury to disregard and set aside the settlement, although it was made without any fraud or deceit on the part of the defendants, or any mistake or misconception by the plaintiff. For this reason the order must be

*Exceptions sustained.*

## JOSEPH B. JOHNSON vs. TRINITY CHURCH SOCIETY.

One who has been ready and offered to perform services according to the terms of a special contract may, if prevented by the adverse party from performing them, recover the amount due to him, under a declaration upon an account annexed.

The secretary of a religious society wrote to a minister informing him that the society had voted on the 1st of January to offer to employ him for one year from that date, for a sum in gross. He accepted the offer, stipulating however that the year should begin on the 1st of February, and the payments be made quarterly from that date. In December following the society passed a vote, which was duly entered on their records and attested by their secretary, reciting that on the 1st of October they "were not indebted to him in the least, and would not become so indebted to him by the terms of the agreement until November following." *Held*, that there was a sufficient memorandum, within the statute of frauds, of a contract extending to the 1st of February.

Evidence of declarations of a committee of a religious society appointed to offer terms to a minister are incompetent evidence to prove the contract of the society, unless they were authorized by the society to make those declarations.

Evidence that a religious society voted "that for the six intervening Sabbaths from December 14th to February 1st the society will supply the pulpit, making their own selections and paying therefor whatever sum is just and proper, and the residue to" their minister at a certain rate per annum, and "that the committee be instructed to require an immediate answer to the foregoing proposition as a compromise," is incompetent for the purpose of proving that the contract for his services was to extend till February 1st.

A minister cannot be allowed to prove his contract with a religious society by reading extracts from a sermon preached by him in their church, to the terms of which no open contradiction was made.

CONTRACT brought against a religious society in Neponset to recover, under a declaration on an account annexed, the sum of three hundred dollars for the salary of the plaintiff as a clergyman from November 1st 1863 to February 1st 1864. The answer set up, amongst other defences, the statute of frauds.

At the trial in the superior court, before *Rockwell, J.*, it appeared that the plaintiff preached for the defendants until the end of December 1863, and was ready to preach during the month of January 1864, but the defendants would not allow him to do so; and it did not appear that he performed any specific parochial duties during that month, though he was there ready to do so.

In order to prove his contract, the plaintiff put in evidence the following correspondence.

"Dorchester, January 1, 1863. Rev. J. B. Johnson: Dear Sir: At a meeting of Trinity Church Society held this evening, it

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*Johnson v. Trinity Church Society.*

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was unanimously resolved that, whereas said society, at its meeting held December 16th 1862, voted that a committee of two be appointed to confer with the Rev. J. B. Johnson in regard to securing his services and residence among us as a pastor for the year succeeding January 1st 1863, and to inform him that the society are willing to pay therefor a salary of twelve hundred dollars per year, and giving a vacation of two weeks in the month of August; and whereas the society still entertain the hope that Mr. Johnson may accept said proposal; that Messrs. Clay and Snow be the committee to confer further with Mr. Johnson, and to solicit his acceptance of our proposal. A. E. Young, secretary Trinity Church Society."

To this letter the plaintiff replied as follows :

"Waltham, January 6th, 1863. Messrs. Clay and Snow: Gentlemen: The invitation which the Trinitarian Congregational Society of Neponset, through you as their committee, have been pleased to extend to me to act as pastor of your society for the year to come, I have, as you are already aware, informally accepted. This note is simply a formal acknowledgment and acceptance. I am to preach, as signified in a previous line to Mr. Young, the present month as usual. The year for which I am engaged commencing with the first of February current, and payments, at rate proposed, quarterly from that date. As to vacation, it will give me pleasure so to supply the pulpit the present year that no additional expense may fall upon the society. I am, as ever, yours in Christian love J. B. Johnson."

The plaintiff was also allowed to testify, against the defendants' objection, to a certain conversation between himself and Mr. Clay and Mr. Young, on the 5th of January 1863, as to the terms of the contract; as to which, however, he was contradicted by them.

It appeared that the above letter of the plaintiff was duly received and passed to the secretary of the society, who read it to the society at their annual meeting in March 1863, but no action was taken upon it and no reply was made to the plaintiff and he continued to preach as their pastor.

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The plaintiff introduced in evidence the record of a meeting of the society on the 5th of December 1863, when a vote was passed appointing a committee to wait upon him and request him to withdraw and terminate his pastoral relation with them "for various reasons, a part of which are as follows, to wit: that his letter to Mr. Brooks relative to his gas bill was a misrepresentation of facts and injurious to the society, inasmuch as he therein asserts that the society is indebted to him in the sum of three hundred dollars, the payment of which has for some time been daily and hourly expected; whereas the facts are, Mr. Johnson's gas bill amounting to about five dollars was due from him to the gas company October 1st, at which time the society were not indebted to him in the least, and would not become so indebted to him by the terms of the agreement until November following."

The plaintiff was also allowed, under objection, to introduce in evidence the following extract from the record of a meeting of the society held on the 12th of December 1863: "Resolved, that a committee of two be appointed to wait upon Mr. Johnson and inform him that, inasmuch as he has refused to withdraw from the pulpit of the society as requested, therefore the society propose to him as follows: that for the six intervening Sabbaths from December 14th to February 1st the society will supply the pulpit, making their own selections and paying therefor whatever sum is just and proper, and the residue to Mr. Johnson at the rate of \$1200 per annum.

"Voted, that the committee be instructed to require of Mr. Johnson an immediate answer to the foregoing proposition as a compromise."

The plaintiff was also allowed, under objection, to read and put into the case a part of a sermon which he said he preached to the usual congregation of the defendants' society on the first Sunday of February 1863, and in which he spoke of their meeting "at the beginning of a year to us of united Christian labor."

The defendants brought into court the sum of two hundred dollars, which the plaintiff took; and they objected that under the pleadings the plaintiff could not recover except for services

prior to January 1st 1864. The judge, however, overruled the objection.

The jury returned a verdict for the plaintiff for one hundred and nine dollars, under instructions authorizing them to do so; and the defendants alleged exceptions.

*W. Colburn*, for the defendants. 1. The contract relied upon was within the statute of frauds, and there was no sufficient note or memorandum in writing thereof. Gen. Sts. c. 105, § 1, 2. The conversation with Clay and Young was inadmissible. 3. The extract from the sermon was incompetent evidence. The occasion forbade a reply to it; no one was authorized to speak for the defendants; it was merely parol evidence of a contract within the statute of frauds; and as a contract, or proof of one, was in violation of the statutes for the observance of the Lord's day. 4. The resolutions of December 12th were merely propositions for a compromise. 5. Under the pleadings, no recovery can be had for the month of January. 2 Greenl. Ev. § 104. *Moulton v. Trask*, 9 Met. 577.

*J. Nickerson*, for the plaintiff.

HOAR, J. 1. The declaration is sufficient to maintain the plaintiff's action, if the contract upon which he relied was supported by the evidence. *Thompson v. Catholic Cong. Soc. in Rehoboth*, 5 Pick. 469. *Sheldon v. Cong. Parish in Easton*, 24 Pick. 481. His readiness to perform his duties as a minister during the whole time for which he was settled, if he was prevented from performing them by the act of the defendants, would enable him to sue upon an account annexed, nothing remaining to be done under the contract but the payment of money.

2. The defence of the statute of frauds is not available to the defendants, if the plaintiff proved a contract for the year ending February 1st 1864. In that case it would be a contract not to be performed within a year from the time it was made, and the statute would require a memorandum in writing. Such a memorandum is supplied by the letter of January 1st 1863, and the recital in the votes passed at the meeting of the society on the 5th of December 1863, which together contain all the terms of the contract. The proposal contained in the letter was accepted

by the plaintiff in his letter of January 6th 1863, with two modifications; that the year of service should begin on the first of February instead of the first of January, and that the salary should be paid quarterly. It then remains to show, by a writing signed by the defendants or an authorized agent, that they assented to these modifications; and we think the statement in the vote of December 5th is sufficient to authorize the conclusion that such was the fact. There is nothing in the vote which is inadmissible in evidence on the ground that it was passed as the offer of a compromise. It is a recital of facts which are alleged as a reason for asking the plaintiff to terminate his relations with the society.

3. But while we decide that the contract on which the plaintiff declares is supported by a sufficient memorandum under the statute of frauds, if the contract itself was proved to the satisfaction of the jury, it is important to observe the distinction between the contract and the memorandum. The memorandum is not the contract, although it may be evidence of it. It was for the jury to find whether the contract declared on was the real contract between the parties; and they must do it upon competent evidence. And as evidence was admitted against the objection of the defendants which appears to us to have been incompetent, the exceptions must for that reason be sustained and a new trial granted.

No authority was shown to have been conferred on the witnesses Clay and Young to make admissions binding the defendants; and the evidence of their declarations was therefore incompetent to support the plaintiff's case.

The vote of December 12th 1863 was expressly stated to be the offer of a compromise, and should not therefore have been admitted to prejudice the defendants.

The extract from the plaintiff's sermon, if it proved anything, was merely his declaration of a fact in his own favor, not communicated to the defendants in their corporate capacity, and made under circumstances which could hardly require or admit a contradiction or disclaimer. That the congregation heard it without reply or comment had no tendency to prove that the defendants assented to its truth. *Exceptions sustained.*

## JEREMIAH FITZGERALD vs. JOHN T. JORDAN.

If an officer in serving a warrant for larceny takes from the defendant the goods alleged to have been stolen, and the defendant is discharged upon the complaint, it is the duty of the officer to return the goods; and if the person arrested owns the same and demands their return, and the officer refuses to give them up, he is liable for a conversion of the same; and he will not be excused by the fact that afterwards the complainant in the criminal process, not being the owner of the goods, has nevertheless obtained judgment against him, upon his default, for their conversion, and taken them away from him on execution.

A declaration alleging the conversion of boots is not supported by proof of a conversion of unfinished boots, in process of manufacture.

TORT for the conversion of thirty-six pairs of boots.

At the trial in the superior court, before *Rockwell, J.*, it appeared that the defendant, who was a deputy sheriff, had a warrant against the plaintiff for larceny of the fronts of the boots from Darius Littlefield, and arrested him thereon and took from him the boots in question; and upon the trial of the complaint before a magistrate the plaintiff was discharged, and demanded the return of the boots. The boots however remained in the defendant's possession until they were taken away by a constable on an execution which was issued upon a judgment recovered by Littlefield against the defendant, upon a default, in an action for the conversion of the boots. The constable did not sell them on the execution, but delivered them to Littlefield. Two dozen pairs of the boots had been made up, but the other dozen pairs were unfinished, some not being sewed together at all, and the rest in different stages of progress. The defendant contended that the plaintiff agreed that the boots might remain in his hands for three weeks, so that it might be determined to whom the fronts belonged; but this was denied by the plaintiff. The evidence tended to show that the boots were taken from the defendant within three weeks after the plaintiff was discharged, and that the defendant notified the plaintiff of Littlefield's suit against him.

The defendant objected that under the declaration the plaintiff could not recover except for finished boots, and made various other requests for instructions, which are now immaterial. The

judge declined to give the instructions requested, and instructed the jury as follows :

“ If the boots were in the possession of the plaintiff, and were taken from his possession by the defendant, the defendant having no right of property in them, he is liable for their value, unless the evidence shows that Littlefield owned the fronts, and that the boots had gone into the hands and possession of Littlefield without fault of the defendant. If such appears to be the fact, to the satisfaction of the jury, the plaintiff cannot recover for the whole value of the boots, but only for the value of the boots, deducting the value of the fronts.

“ If the jury are satisfied that the fronts were stolen from Littlefield, and that Littlefield now has the boots, then the plaintiff is entitled to recover ; and the measure of damages will be the value of the boots, wholly or partially finished, at the time of conversion, over and above the value of the fronts.”

The jury returned a verdict for the plaintiff, finding that the fronts were not Littlefield's property ; and the defendant alleged exceptions.

*N. C. Berry*, for the defendant.

*W. Colburn*, for the plaintiff.

**Dewey, J.** Many of the rulings asked for by the defendant become immaterial, inasmuch as the jury have found that the fronts of the boots were not the property of Littlefield. The case under this finding presents itself thus : The defendant, as an officer, had taken into his possession certain property, consisting of boots finished and stock for boots not worked up, upon a warrant alleging that the fronts had been stolen from Littlefield ; but, on examination of the case before a magistrate, the complaint not being supported, the plaintiff was discharged. In this state of the case it was the duty of the officer to return to the plaintiff the property which he had taken from him. It is said that this was properly omitted to be done, by reason of the plaintiff's agreement that the boots might remain in the defendant's hands for three weeks, in order that it might be determined to whom the fronts belonged. But this was denied by the plaintiff. Whether this contract was one in which



Littlefield participated as a party does not distinctly appear. If there was a mutual agreement between Littlefield and the plaintiff that the property should remain in the possession of the defendant three weeks, then the defendant had a good defence to the suit of Littlefield, and ought not to have suffered the action of Littlefield against him to go by default. If it was the sole assent of the plaintiff given to the officer, who had no interest in the property, then the plaintiff had a right to withdraw it and demand the property of the defendant, as he did. But the defendant not only refused to deliver it to him on this demand, but subsequently permitted the same to be taken by a constable from him, upon an execution upon a judgment in favor of Littlefield against the defendant, by whom the same was passed into the hands of Littlefield, but not sold on the execution. Upon these facts the jury might properly find that the defendant had been guilty of a conversion of the property. We see no ground for exceptions as to the ruling of the court upon this point.

The only ground for exceptions is as to the matter of variance. It was objected on the part of the defendant that, as the plaintiff had brought his action alleging a conversion of three dozen pairs of boots, and as by the evidence it appeared that a portion of the articles thus converted were mere stock for boots, in various stages of manufacture, and not finished boots, the latter were not included in this declaration, and that for so much the plaintiff could not recover in the present action. We think this instruction should have been given.

The error is, however, one only affecting the amount of damages. A new trial must be had as to the damages, confining the same to the compensation for the boots taken; and as to the ruling upon this point the exceptions are sustained. See *Kent v. Whitney*, 9 Allen, 62. *Exceptions sustained.*

## CHARLES TUCKER vs. HORACE TARBELL.

An action of tort which is submitted by the plaintiff to the jury solely upon the ground that the defendant forcibly prevented him from exercising certain rights is not supported by proof of a mere verbal prohibition on the part of the defendant.

**TORT.** The declaration alleged that the plaintiff, being a dealer in milk, had a right to transport milk from Southboro' to Boston in a certain car over the Boston and Worcester Railroad, and the defendant entered said car and with force and arms removed the plaintiff's cans of milk, and prevented the plaintiff from transporting them, and prevented other cans of the plaintiff's milk from being placed in the car, and converted fifty cans of the plaintiff's milk to his own use.

At the trial in the superior court, before *Rockwell, J.* the only ground upon which the trial proceeded was, that the defendant forcibly prevented the plaintiff from placing his cans of milk in his apartment of a milk car, in which other apartments were used by the defendant and others. The testimony of the witnesses of the plaintiff was to the effect that the defendant forbade the plaintiff's agent to put the cans into his apartment, and that when some of the plaintiff's cans of milk had been put upon the floor of the car the defendant poured milk from some of them into other cans; but there was no evidence of any force on his part.

The judge ruled that, as the only ground upon which the action was sought to be sustained was that of forcible resistance on the part of the defendant, the testimony was not sufficient to prove such forcible acts as would entitle the plaintiff to recover. The jury accordingly returned a verdict for the defendant, and the plaintiff alleged exceptions.

*N. F. Safford*, for the plaintiff.

*G. W. Searle*, for the defendant.

**COLT, J.** The plaintiff put his case at the trial solely on the ground that the defendant had forcibly prevented him from placing his milk in the apartment of the car to which he was

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entitled. He doubtless had good reason for seeking to recover damages for that injury alone. The defendant might have been well prepared to meet any other aspect of the case. It is unnecessary, therefore, to inquire whether under the declaration he might have maintained his case for a conversion of the property. He waived all such claim at the trial; and it is clear that the evidence which he produced would not justify the jury in finding that force had been employed by the defendant upon the occasion in question. *Exception overruled.*

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EMERY FISK vs. JAMES GRAY.

If a bond is given in a certain sum "mutually agreed upon as liquidated damages," with condition to pay off a mortgage debt within a certain time upon land conveyed to the obligor, and to pay the interest thereon semi-annually until the principal is paid, and to pay all taxes assessed on the premises and to keep the buildings insured against fire to a certain amount, and the sum provided to be paid is referred to only in the early and formal part of the bond, and is several times as great as the semi-annual instalments of interest, it is to be treated as a penalty and not as liquidated damages.

CONTRACT on a bond dated May 1st 1862, executed by the defendant to the plaintiff, "in the full and just sum of one hundred dollars, mutually agreed upon as liquidated damages," the condition of which recited that Henry A. Fuller had conveyed to the defendant a parcel of land in Needham, subject to a mortgage to the plaintiff for one thousand dollars, which the defendant was to pay as his own debt, and providing that within two years the defendant should pay to the plaintiff the principal due upon said mortgage, with interest semi-annually until the principal should be paid, and also pay all taxes assessed on the land, and keep the buildings thereon insured against fire in a sum not less than one thousand dollars, payable to the plaintiff in case of loss.

It was agreed in the superior court that the facts recited in the condition of the above bond were true, and that the plaintiff was about to take possession of the land for non-payment of interest, when the defendant agreed to give the bond if the

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plaintiff would not take possession, and this was accordingly done. The principal and interest were not paid by the defendant in accordance with the stipulation of the bond, and this action was thereupon commenced.

On these facts, judgment was ordered for the plaintiff for one hundred dollars, and execution ordered to issue for the whole amount; and the defendant appealed to this court.

*A. Cottrell*, for the defendant, submitted the case without argument.

*W. Colburn*, for the plaintiff, cited 2 Greenl. Ev. § 259; *Bagley v. Peddie*, 5 Sandf. 192; *Varnum v. Meserve*, 8 Allen, 158.

GRAY, J. Upon the application of the rules of construction which the courts have adopted in ascertaining whether a certain sum, agreed to be paid upon a breach of contract, is to be deemed a penalty, or liquidated damages, we are of opinion that this case belongs to the first class. The description of the sum of one hundred dollars as "mutually agreed upon as liquidated damages," though entitled to consideration, is not conclusive, and is of less weight when it is inserted only in the formal part of the contract, and may therefore have been written by the scrivener without attracting the particular attention of the parties. This instrument is in the form of a bond, and no other sum is mentioned as a penalty. It contains several distinct stipulations of various importance, to be performed at different times. Most of them are for the payment of fixed sums of money, and some of them are for the payment of semi-annual instalments of interest of thirty dollars each. The value of those stipulations which are not for the payment of money can be readily estimated; for the amount of taxes will be fixed by the assessment, and the premium required for an insurance of one thousand dollars is not difficult to be ascertained. Upon a view of the whole contract, it is not to be inferred that the parties really intended that the whole sum of one hundred dollars should be paid in the event of the breach of any one of several stipulations, many of which were for the payment in money of less than a third of that sum. *Heard v. Bowers*, 23 Pick. 456. *Lynde v. Thomson*, 2 Allen, 460. *Horner v. Flintoff*,

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Richardson v. Smith.

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9 M. & W. 678. *Dimech v. Corlett*, 12 Moore P. C. 229, 230  
*Lampman v. Cochran*, 16 N. Y. 275. 2 Greenl. Ev. § 258.

The superior court, in assessing the damages, evidently considered them as having been liquidated by the parties in the contract. Its judgment must therefore be reversed, so far as execution was ordered to issue for the whole amount, and the case be referred to an assessor, unless the parties agree upon the amount for which execution should issue.

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THOMAS RICHARDSON vs. THOMAS SMITH.

If a valid attachment has been made of the property of a defendant who has never lived in Massachusetts, and he, being out of the Commonwealth, acknowledges service of the writ and waives the benefit of the statutes respecting absent defendants, judgment may be rendered and execution issued against him upon his default, in the same manner as if the writ had been duly served upon him by an officer within the Commonwealth.

Proof that an attaching creditor had heard a report that his debtor had conveyed all his property to another, who in consideration thereof was to pay his debts, and that such person, upon being called on by the creditor, did not deny his responsibility, but promised to pay the sum due to the creditor, is not sufficient to require a finding that the creditor had actual notice of an unrecorded deed from his debtor to such person.

TORT for breaking and entering the plaintiff's close, in Plymouth county. Writ dated November 24th 1863.

At the trial in the superior court, before *Putnam, J.*, without a jury, no question was raised as to the venue, both parties desiring the title to be settled. [See *Way v. Dame*, *post*, 357.]

It appeared that at the time of the alleged trespass the plaintiff was in possession of the premises under a deed to him from Elisha Doane the younger, dated October 30th 1856, which was not recorded in Plymouth county till after the commencement of this action.

The defendant acted under the authority of Josiah O. Lawrence, who offered evidence to establish his title as follows :

1. An attachment by him upon a writ against Henry Doane, May 21st 1861, and a levy of execution upon the judgment obtained in the suit in November 1861. Henry Doane was an absent defendant, who never lived in Massachusetts, but lived in

New Hampshire, and after the attachment of his real estate upon the writ, he signed the following indorsement thereon : "State of New Hampshire, Belknap county, ss. Guilford, July 6, 1861. I, Henry Doane, the defendant named in the within writ, hereby acknowledge service of the same, and waive the benefit of the statutes of Massachusetts respecting absent defendants. Henry Doane." At the return term of the writ, judgment was rendered against Doane upon his default, and the execution issued without the filing of any bond.

2. A deed of the premises from Elisha Doane to D. S. Greenough, dated January 5th 1815, and duly recorded. A deed from D. S. Greenough to Elisha Doane, dated September 23, 1823, and not recorded till during this trial. The will of Elisha Doane, senior, duly proved, devising his estate to his children; and a partition of his real estate among them, by which the premises now in controversy were set off to his son, Henry Doane, the defendant in the suit of Lawrence above referred to.

This partition was never recorded in Plymouth County; and it appeared that there was no record title in Plymouth County in Henry Doane at any time prior to the bringing of this action.

The bill of exceptions then stated that "in order to show that Lawrence had notice of the plaintiff's title, and of an unrecorded deed of the premises from Henry Doane to Elisha Doane, under whom the plaintiff obtained his title, the plaintiff relied on the following evidence : Lawrence testified that he had heard that Henry Doane had conveyed all his property to Elisha Doane, who was to pay Henry Doane's debts, and that he went to Elisha to get his pay; that Elisha said he would pay, but never did; and that he had heard that the plaintiff was in possession of the premises, but never heard that he had a deed of them. He searched the records of Plymouth County before he made the attachment, but found no record of any such deed."

The plaintiff also offered in evidence a letter to him from Lawrence, saying, "I had heard that Henry Doane had given a deed of all his real estate to his son Elisha, upon condition that Elisha should pay all his debts. I called upon Elisha, who did

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not refuse or deny his responsibility, but delayed, and died without paying. I therefore examined the records of Plymouth County to ascertain the owner, and could find no evidence of title under conveyance from Henry Doane. I therefore, after taking legal advice, attached the estate as Henry Doane's."

The judge ruled that these facts did not prove notice of any title in the plaintiff, or of a deed from Henry Doane, and found as a fact that the defendant had no such notice, and on the whole case found for the defendant. The plaintiff alleged exceptions.

*E. Avery, (G. M. Hobbs with him,) for the plaintiff.*

*W. S. Leland, for the defendant.*

DEWEY, J. 1. In answer to the title set up by the defendant under the levy of an execution upon a judgment obtained by Josiah O. Lawrence against Henry Doane, we think the plaintiff may show that such judgment was invalid against the debtor the plaintiff being neither party nor privy to it, and not authorized to bring a writ of error. *Downs v. Fuller*, 2 Met. 135. *Leonard v. Bryant*, 11 Met. 370.

This the plaintiff attempts to do by the record of the proceedings in that case. It is admitted that Henry Doane, the defendant in that action, was an inhabitant of New Hampshire at the time of the service of the writ, and that he had never resided in Massachusetts. It appears that certain real estate of said Henry Doane, situated in the county of Plymouth, was duly attached by the plaintiff in that action. It further appears by the record that a default of Doane was entered at the return term, and thereupon a judgment was entered, and an execution issued.

The ground for setting aside this judgment is, that there was no continuance of the action, and no legal notice given to Doane, as required by Gen. Sts. c. 126, § 6.

An effectual attachment of his estate was made on the original writ, and that was sufficient to give jurisdiction of the case to the court. Gen. Sts. c. 126, § 1. The difficulty, if any exists, is not, therefore, as to the original jurisdiction, but whether the party took the necessary subsequent steps to authorize taking a judgment against Doane.

As already stated, there was no continuance, and no notice by publication in the newspapers or in any other mode, under an order by the court. The question of the validity of the judgment depends upon the effect to be given to a certain writing indorsed on the original writ, signed by the defendant in the action, purporting to be an acknowledgment of service of the same, and waiving the benefit of our statute respecting absent defendants. No suggestion is made that this is not the genuine signature of Doane, or that the same was not indorsed on the writ understandingly, and for the purposes therein expressed.

That a service of process by an officer of Massachusetts made in another state upon a party residing there, by giving him a copy of the writ or summons, would be of no effect, and would not authorize a judgment, is well settled. *Arnold v. Tourtellot*, 13 Pick. 172. We must assume, therefore, that no acts of the officer without his jurisdiction are to be taken to be a service of the writ, or deemed to be a notice to the party of a pending suit.

But the question then arises, may not the defendant in such action, after an effectual attachment of property has been made here, by indorsement on the writ waive a continuance of the action and an order of the court for notice under the statute?

The case of *Morrison v. Underwood*, 5 Cush. 52, has gone very far to settle this case, and to sustain the doctrine that the statute provisions as to giving notice to absent defendants may be waived by a defendant. That was a case of jurisdiction obtained by the fact that the party had at a former period lived in Massachusetts, and in such case a service may be made in the first instance by leaving a summons at the last and usual place of abode of the defendant, which gives the court jurisdiction but requires a continuance of the action, and a further notice in such form as the court shall direct. No such order and notice having been given, and the party having been defaulted, he sought to set aside the judgment. But upon oral evidence of his having had actual notice of the suit, and of its entry upon the docket, and upon its further appearing that the defendant thereupon stated that it was all correct, and that the plaintiff



might take judgment, he was not allowed to set it aside on a writ of error, the court holding that the statute "provisions for giving an absent defendant actual notice where the service is such as to hold the defendant amenable, and to give the court jurisdiction of the case and the parties, are provisions for the security and benefit of the defendant, and may be waived by him : *Consensus tollit errorem.*"

The case now under consideration differs from *Morrison v. Underwood* in this, that this suit was against one who has never resided in this commonwealth. But the original service by attachment was equally effective to give the court jurisdiction. Gen. Sts. c. 126, § 1. The statute requisition as to continuance and order of notice by the court are equally applicable to both cases. The single question is, as to the sufficiency and competency of the evidence to show an effectual waiver of further notice. In the case of *Morrison v. Underwood* there was nothing on the record. It was only a case where actual notice was shown, and a verbal statement of the party "that it was all right, and the plaintiff might take judgment." In the present case, a most explicit waiver, formally drawn up and signed by the party, is indorsed on the writ. If any written statement can have the effect to estop an absent defendant from avoiding a judgment for want of notice under our statute, the present must be held to have that effect. If the defendant Doane could not sustain a writ of error to reverse the judgment for want of notice, neither can the present plaintiff avoid the same for that cause, upon plea and proof.

This case differs from those where parties have attempted by mutual consent to confer jurisdiction upon the court, where otherwise it had none. The jurisdiction did attach here by the attachment of property of the absent defendant found within this commonwealth. The indorsement upon the writ under the hand of the defendant only waived further notice of the pendency of a suit well instituted and authorized by our laws.

We do not mean to say that it may not be discretionary with the court in which such action is pending, whether they will omit the usual order for continuance and notice, and accept as

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a substitute such acknowledgment of service. They may not be satisfied with the genuineness of the signature, or that the same was made understandingly. But however this may be, when such an indorsement is shown to have been duly made, and intended to operate as a waiver of all errors as to notice, and a judgment has been entered against the party, it may be properly treated as a valid waiver, if there is an attempt to invalidate the judgment.

The want of a bond required by the statute was also here waived by the waiver of the benefit of the statutes respecting absent defendants. Whether this objection could in any case be made a ground of objection to the validity of the execution, by a person not party or privy to the judgment, it is unnecessary to decide.

2. Upon the other point raised, that the attaching creditor had actual notice of the unrecorded deed from Henry Doane to Elisha Doane, the judge of the superior court properly ruled that the facts offered in evidence did not prove actual notice of such deed, and further found as a fact that Lawrence had no such notice. This fully disposes of that question.

*Exceptions overruled.*

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**JEREMIAH PLIMPTON & another vs. WARREN FULLER & others.**

W a testator devises to one person all his right, title and interest in certain real estate, which is subject to a right of dower and a mortgage given by himself to secure his promissory note, and, after various legacies of money, bequeaths to another person the residue of his personal estate, after the payment of all his just debts, legacies and charges against his estate, the mortgage debt is to be paid out of his personal estate, to the exoneration of the real estate.

**BILL IN EQUITY** in the nature of a bill of interpleader, by the executors of the will of Francis W. Fuller, setting forth a copy of the testator's will, which contained the following devise:

"I give, bequeath and devise to my father, Warren Fuller, and to my mother, Eliza B. Fuller their heirs and assigns, all

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the right, title and interest which I own in the homestead now occupied by my said father, Warren Fuller, excepting that my aunts, Eliza Fuller and Hannah Fuller, are to have free and undisturbed possession of the old house, with all the privileges they have heretofore had, except that of cutting off wood."

The will also contained various devises and legacies of money, and gave the residue of the personal estate to his wife, "after the payment of all my just debts, legacies and charges against my estate." The bill further set forth that the land described in the devise above quoted was subject to a mortgage by the testator to secure his promissory note for \$1666.67, with interest payable semi-annually; that the testator paid the interest on this debt as it became due, up to the time of his death, in January 1864; that since his death no interest had been paid; that the legacies of money amounted to \$4300, and the assets, exclusive of specific devises and bequests, to about \$5541; and praying that the several defendants, who were the widow and legatees of the testator, might be decreed to interplead, and that it might be determined by whom the mortgage debt should be paid. These facts were all admitted by the several parties who appeared as defendants.

*W. S. Leland*, for the widow and one of the legatees. There is an obvious distinction between a devise of the testator's interest in an estate and a devise of the estate itself, and in this particular the present case is distinguishable from *Andrews v Bishop*, 5 Allen, 490. In the present case, the estate owned by the testator was the equity, and the thing devised was not the estate itself, but his interest in it. This clearly includes only the equity. And the intent of the testator to this effect is fairly manifest, upon inspection of his will.

*W. Colburn*, for Warren Fuller and wife.

GRAY, J. The general rule of law, in the absence of any expressed intent, is that debts contracted by the testator, although secured by mortgage, are to be paid out of his personal property to the exoneration of his real estate. *Seaver v. Lewis*, 14 Mass. 82. *Hewes v. Dehon*, 3 Gray, 205. In this case, the expressed intent accords with the general rule. The gift of the personal property

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*Drake v. Wells.*

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to the widow is in terms postponed to the payment of all debts, legacies and charges against the estate. In the devise of the homestead to the father, the use of the words restricting it to the testator's right, title and interest is accounted for by the outstanding right of dower in his mother, if not by a life estate in his aunts. The direction to sell other real estate has no tendency to charge this. The manifest intention of the testator was to devise to his father the homestead which had once been his, subject only to his wife's right of dower, and to the possession for life of the testator's maiden aunts. The personal property is therefore to be applied to the discharge of the mortgage.

*Decree accordingly.*

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EMMA R. DRAKE *vs.* HORACE O. WELLS.

SAME *vs.* DAVID WYMAN.

SAME *vs.* WILLIAM E. HEWINS.

If the owner of land for a valuable consideration orally licenses another to cut off within a certain time the trees standing upon it, and afterwards executes an absolute deed of the land to a third person, such deed, when made known to the licensee, will operate as a revocation of the license, although the grantee had knowledge of it.

THREE actions of tort in the nature of trespass *quare clausum*.

At the trial in the superior court, before *Rockwell, J.*, the following facts appeared: In November 1863 Manley Drake put up and sold at auction the standing wood on the close described, in several parcels, and the defendants each became the purchaser of one or more of said parcels; and at the auction the auctioneer stated publicly, and as one of the terms of sale, that the purchasers might have until the middle of the following June to cut and remove the wood from the land.

At the same auction, and after the sale of the wood had been completed, the land was put up by the same auctioneer for sale, in two lots; and the plaintiff, through an agent who was present at the sale of both wood and land and heard the terms of

sale stated by the auctioneer, bid off and became the purchaser of one of the lots, and Azel Drake purchased the other. Subsequently in the same month deeds of the lots were executed by Manley Drake to Emma R. Drake and Azel Drake; and on the 12th day of February 1864 Azel Drake sold and conveyed by deed the lot purchased by him to the plaintiff. All the deeds above mentioned were entered for record on the 14th of June 1864; but it was not contended, at the argument in this court, that the defendants were ignorant of the sale of the land by Manley Drake, and the execution of the deeds thereof, at the time when the trees were cut.

The deeds from Manley Drake to the plaintiff and Azel Drake, and the deed from said Azel to the plaintiff, were warranty deeds, containing no reservation of standing wood, or of any right to enter upon the land to cut or remove the same; and all the acts of trespass complained of consisted in cutting and carrying away the wood sold, and were committed by the several defendants prior to the 15th of June 1864.

Upon these facts, the judge instructed the jury that the plaintiff was not entitled to recover in either of said actions, and verdicts were accordingly rendered for the defendants. The plaintiff alleged exceptions.

*J. E. Carpenter*, for the plaintiff.

*W. Colburn*, for the defendants.

BIGELOW, C. J. The doctrine is now well settled that a sale of timber or other product of the soil, which is to be severed from the freehold by the vendee under a special license to enter on the land for that purpose is, in contemplation of the parties, a sale of chattels only, and cannot be regarded as passing an interest in the land, and is not for that reason required to be in writing as being within the statute of frauds. Such license to enter on the land of another, so far as it is executed, is irrevocable; because, by the severance of the timber or other growth of the soil from the freehold, in execution of the license, it becomes personal property, the title to which is vested in the vendee absolutely, and the rule applies that where chattels belonging to one person are placed or left on the land of another, with the

permission or assent of the latter, the owner of the chattels has an implied irrevocable license to enter and remove them. In such case the owner of land cannot, by withdrawing his assent to enter on his premises, deprive the owner of chattels of his property, or prevent him from regaining possession of them. The law will not lend its aid to the perpetration of a fraud. But it is otherwise where the contract has not been executed by a severance of the subject matter of a contract of sale from the freehold. So long as the timber or other product of the soil continues in its natural condition, and no act is done by the vendee towards its separation from the soil, no property or title passes to the vendee. The whole rests in contract. A revocation of the license to enter on the land does not defeat any valid title; it does not deprive an owner of chattels of his property in or possession of them. The contract being still executory, no title has passed to the vendee, and the refusal of the vendor to permit the vendee to enter on the land for the purpose of disconnecting from the freehold the property agreed to be sold is only a breach of contract, the remedy for which is an action for damages, as in the common case of a failure or refusal to deliver ordinary chattels in pursuance of a contract of sale.

These principles have been recognized and established as the law of this commonwealth in several adjudicated cases. In *Claylin v. Carpenter*, 4 Met. 580, 582, it was held that a contract for the sale of standing wood to be cut and severed from the freehold was to be construed "as passing an interest in the trees when they are severed," and that a license to enter on the land under such contract could not be countermanded after it had been acted on. So in *Nettleton v. Sikes*, 8 Met. 34, it was said by the court that a beneficial license to be exercised on land, "when acted upon under a valid contract cannot be countermanded." To the same effect are *Nelson v. Nelson*, 6 Gray, 385, and *Douglas v. Shumway*, 13 Gray, 498. In these cases it appeared that the license had been acted on by the vendee, who had entered on the land and cut the timber which was the subject of the contract of sale, and had thereby acquired a title to the wood as personal property. In *Giles v. Simonds*,

15 Gray, , a case was presented where a vendee had entered on land under a contract of sale of standing wood, and had cut down a part of those which was agreed to be sold, when he was forbidden by the vendor, the owner of the land, from proceeding any further in the execution of the contract, and also from removing those which had been severed from the freehold. He nevertheless did go on the land and take away such of the trees as had been previously cut down. It was held that the vendor had a right to terminate the contract and revoke the license as to the trees left standing, but that he could not do so as to those which had been already cut, and that an action of trespass would not lie for entering and taking away the latter. See also *Burton v. Scherpf*, 1 Allen, 135.

The application of the principles established by these cases is decisive of the rights of the parties to these actions. Taking the most favorable view of these cases in behalf of the defendants, they had acquired no title to the wood standing on the land of the plaintiff. They had only an executory contract for the purchase of the trees growing on the premises, with a license from the plaintiff's grantor to enter and cut and remove the same. This license, not having been acted on, was revocable. And it was revoked by the deed of the land to the plaintiff by the licensor, by which it was conveyed absolutely and free of all incumbrances to the plaintiff. In *Cook v. Stearns*, 11 Mass. 533, 538, it was held that the transfer of land to another, or even a lease of it, without any reservation, would, of itself, be a countermand of a license. Clearly it must be so, because an unqualified grant of land carries with it the title to everything which is part of the realty or annexed to the freehold, and is inconsistent with a right in any other person than the grantee to enter on the land and remove therefrom trees growing thereon or other products of the soil. *Coleman v. Foster*, 1 Hurlst. & Norm. 37.

It follows that the ruling of the court was erroneous at the trial of this cause. The defendants were trespassers, and were liable to the plaintiff for entering her close and cutting and removing wood therefrom. *Exceptions sustained.*

## SIMEON TUCKER vs PHILIP H. DRAKE &amp; another.

It is not a fraud upon creditors nor an act in violation of the insolvent laws for an insolvent debtor to give new notes in exchange for notes dated before the passage of *St. 1855, c. 238*, for the purpose of extinguishing his old debts and thus entitling himself to hold his homestead; but in such case if the debtor does not disclose his purpose and assigns a different reason for the exchange, and the creditors accept the new notes without understanding that their rights will thereby be impaired, the new notes will not, while in the hands of original parties, be held to extinguish the old ones, but will be considered merely as renewals of them, and therefore the debtor will have no right to a homestead as against them.

HOAR, J. The plaintiff brings his bill against his assignees in insolvency, asking to have a homestead set off to him in the real estate which he occupied when he went into insolvency. It is admitted that he is entitled to it, except so far as his right is affected by the exception in *St. 1855, c. 238*. That statute exempted from levy on execution the homestead of a householder, to the value of \$800; but by § 3 it is provided that "no property by virtue of the act shall be exempted from levy for any debt contracted previous to the passage of this act." The parties agree that one debt, due to Mrs. Reupske, of \$100 and some interest, comes under this provision; and the only question argued is, whether there are any other debts to which it applies.

The evidence establishes the fact that the debtor, after he became insolvent, and a short time before he filed his petition in insolvency, owed several notes, amounting in the whole to more than \$800, bearing date prior to the passage of *St. 1855*; that, with the intention and for the purpose of securing to himself the homestead exemption, he prevailed upon the holders of these notes to exchange them for new notes of like amount; that he did not disclose to them his purpose in procuring the exchange, but gave as a reason for asking it that the old notes were nearly covered with indorsements of interest, and that the new ones were better looking; and that the holders were not aware that taking new notes would affect in any manner their rights or his responsibility upon them.

The assignees deny that the insolvent can derive any benefit



from this exchange of notes, upon three grounds: 1st, That it was a fraud upon the holders of the notes; 2dly, that the transaction was a fraud upon the insolvent law, and therefore invalid in law against them; and 3dly, that the notes are still debts contracted before the passage of the act of 1855. We are of opinion that neither of the first two grounds can be maintained.

1. The insolvent is not shown to have made any false statement to the holders of the notes. He had a purpose in procuring their consent to the contract, which he did not disclose, but he was under no legal obligation to inform them as to their legal rights. Nor is the fact that a person who makes a contract knows that he is insolvent, and does not disclose it to the other party, sufficient in general to avoid the contract. The debtor gave the creditors all that he agreed to give them. He did no act and made no statement which deceived them. He designed a consequence to the bargain, which he supposed the law would attach to it, different from that which they understood; and he did not communicate his purpose. Whatever may be the requirements of the highest morality, this cannot be held sufficient in law to avoid the contract.

2. The change in the form of the debts, although made when the debtor knew that he was insolvent, was not in fraud of the insolvent law. The right of the assignees is wholly derivative, and is no greater than that of the creditors with whom the exchange of notes was made. If a debtor, knowing that he is unable to pay his debts, purchases property exempt from levy on execution, he exercises a privilege which the law gives him, and wrongs no one. If he buys provisions for his family, or a cow, or necessary clothing, he merely puts his property in a shape which the humanity of the law authorizes. And there is nothing to distinguish the exemption of a homestead from the like exemption of personal property.

The policy of the insolvent law is as clear in the provisions which it makes for the debtor as in those which it makes for creditors. The debtor, by securing a homestead for himself and family, whether by an arrangement with creditors who might levy on it, or by the purchase of a house, or by moving into a

house which he already owns, takes nothing from his creditors which the law has secured to them, or in which they have any vested right. He conceals no property. He merely puts his property into a shape in which it will be the subject of a beneficial provision for himself which the law recognizes and allows.

3. But the third point taken by the respondents is more substantial, and in our judgment is decisive.

It is the settled law in this commonwealth that giving a negotiable promissory note is a payment of a simple contract debt, unless it appears that it was not so intended. But it has been held sufficient evidence to meet and repel this presumption, and to show that the note was not intended as a payment, if, by treating it as a payment, the creditor would lose the advantage of some security; as a mortgage, guaranty, or the like. Now in this case, if the new notes taken were regarded as payment of the earlier ones, the creditors would lose the advantage of the exemption of the debtor's real estate from the right of homestead, which the law gave them. It is true that the debtor intended that the transaction should produce this result, and the creditors were ignorant that it would have any effect upon their rights; so that it may be said there could not have been an intention that it should not be a payment. But we are of opinion that this is rather specious than sound. Whatever was the purpose of the debtor in his own mind, he did not communicate to the holders of the notes that anything else was proposed than a simple renewal of the notes. The reasons given for the exchange, that the old notes were covered with indorsements, or that the new ones were on handsomer paper, or that some persons thought an old note not so good as a new one, would lead to no other conclusion. The notes taken did not vary the obligation of those for which they were exchanged in any particular except by having a new date, which was merely a written admission of what the law implied from the existing facts. Some of the new notes were dated not according to the fact when executed, but to correspond to the last payment of interest.

We think the evidence shows that the creditors were in substance informed that a renewal was intended, and that this was

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the transaction to which they assented. That they were not aware that the legal effect of a renewal would differ from that of the payment of one note by another would then be immaterial. In *Pomroy v. Rice*, 16 Pick. 24, it is said by Mr. Justice Wilde that a direction to renew a note, although by making it payable to a new payee, *ex vi termini* shows that the exchange of one note for the other was not intended to be a payment. And we find no case reported in this commonwealth in which the mere exchange of one note for another, without change of amount, parties or time of payment, has ever been held to be a payment of the first. The debtor himself, in his examination in insolvency, says that he renewed these notes, and speaks of them as renewals.

The proof of the new notes in insolvency, if they were mere renewals, would not affect the rights of the creditors. Within the meaning of *St.* 1855, therefore, they were still debts contracted before the passage of that act. The date of the notes merely gives the time of the new promise to pay a debt already contracted.

It is not necessary to decide whether the new notes would be held to be new obligations in the hands of third persons, if they had been transferred by indorsement. This case is between the original parties; and the transaction between them does not, for the reasons given, appear to us to involve the contracting of any new debt.

The plaintiff is therefore not entitled to the homestead which he claims, and the bill must be

*Dismissed, with costs.*

*N. C. Berry*, for the plaintiff.

*B. F. Brooks*, for the defendants.

## INHABITANTS OF WALPOLE vs. LAWSON D. GRAY &amp; others.

If the defendants in an action brought in favor of a town have filed an affidavit of merits at the first term, the objection that the action was brought without the authority of the town cannot be taken after the expiration of that term, even though they have leave to file their answer in the vacation.

CONTRACT brought upon three bonds of the collector of taxes and his sureties. The writ was returnable to the superior court, September term 1864, and an affidavit of merits was duly filed during the term, and leave having been given to extend the time of filing the answer, and the court having adjourned before the expiration of thirty days from the return day, the answer was filed in vacation, and amongst other defences denied that any person or persons had any authority to bring the suit, or that the plaintiffs ever passed any legal vote authorizing the suit. No exception was taken to the right of the plaintiffs' attorney to appear at any time before the cause was opened to the jury, which was at the second term. It appearing that no vote had been passed by the plaintiffs in town-meeting directing or authorizing the suit, *Rockwell*, J. ordered a nonsuit, ruling that the selectmen of the town could not authorize the suit to be brought. The plaintiffs alleged exceptions.

*H. W. Paine*, for the plaintiffs. The decision of the superior court upon their own rules is not final. *Tripp v. Brownell*, 2 Gray, 402. *Rathbone v. Rathbone*, 4 Pick. 89. And it was too late to raise the objection at the second term. Rule II. of superior court. As to the powers of selectmen to institute suits, see *Augusta v. Leadbetter*, 16 Maine, 45; *Andover v. Grafton*, 7 N. H. 298; *Pike v. Middleton*, 12 N. H. 278; *Dennett v. Nev-ers*, 7 Greenl. 399.

*W. Colburn*, for the defendants. The appointment of agents to prosecute and defend town suits is provided for by Gen. Sta. c. 18, § 8, and should be by vote of the town. This is not a question of the right of an attorney to appear, but of the right of selectmen to bring the suit: and the objection is a substantial and not a formal one, and may be made by answer. *Langdon*

v. *Potter*, 11 Mass. 313. *Christian Society in Plymouth v. Macomber*, 3 Met. 235. Selectmen, without authority, cannot bring a suit in the name of a town. *Butler v. Charlestown*, 7 Gray, 12. *Lexington v. Mulliken*, Ib. 280. The legislature by authorizing suits in certain cases by town officers negative by implication the right in other cases. See Gen. Sts. c. 18, §§ 55, 56; c. 70, § 22; c. 86, § 19.

DEWEY, J. The defendants came too late with their objection, denying any authority to institute and prosecute this action. The action was returnable at September term 1864, and the defendants appeared and filed an affidavit "that they have a substantial defence thereto upon the merits, and intend to bring the same to trial." Nothing further was done by the defendants during the first term. An answer was filed in vacation, and the case was opened to the jury for trial at the second term. No objection had been taken to the right of the plaintiffs' attorney to appear at the first term, nor at any time before the cause was opened to the jury. This was too late to raise the question of authority to institute the action.

An affidavit of merits precludes filing at a subsequent period an answer in abatement. *Cole v. Ackerman*, 7 Gray, 38. *Whipple v. Rogerson*, 12 Gray, 347. An objection of this character should be taken at the first term. *Simonds v. Parker*, 1 Met. 508. *Gerrish v. Gary*, 1 Allen, 214. *Hastings v. Bolton*, 1 Allen, 529. *Pratt v. Sanger*, 4 Gray, 84.

In sustaining these exceptions, we are not to be understood as affirming the authority of selectmen to institute and prosecute suits in the name of the town, or to defend suits against the town, without further authority than that which attaches to their office as selectmen. The view taken by this court in *Butler v. Charlestown*, 7 Gray, 12, and *Lexington v. Mulliken*, Ib. 280, was that they are not authorized thus to act. But the point then arose under very different circumstances from those in the present case, and presented no question as to the proper time for taking such objection by the defendants.

But while we hold that selectmen, as such, are not thereby legally constituted agents of the town to institute and prosecute

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Kerr v. Seaver.

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suits in favor of the town or to appear and defend suits against the town, we do not suppose that a suit thus instituted under some peculiar emergency and when no other person had been authorized to act in the matter would necessarily be in all cases dismissed upon a motion or plea in abatement for that cause filed at the first term. It would be competent for the court upon reasonable grounds shown therefor to order a continuance of the case, to enable the town to ratify and adopt the suit and appoint agents to prosecute the same.

But however this may be, it is not competent to raise the objection in the manner this was done at the second term, the defendants having filed at the first term an affidavit of merits and substantial defence in the case, and that they intend to bring the same to trial.

*Exceptions sustained.*

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WILLIAM KERR vs. CHANDLER SEAYER.

The *St.* of 1864, c. 299, authorizing any person to kill an unlicensed dog wherever found, does not authorize the entry into the dwelling-house of another without his express or implied consent, for the purpose of catching and killing such dog, which has taken refuge there.

TORT for forcibly entering the plaintiff's close in Needham, and carrying away a dog, the property of the plaintiff.

The defendant justified his acts; and, at the trial in the superior court, before *Russell*, J. without a jury, it appeared that in July 1864 a dog entered upon the defendant's premises and killed several of his chickens, and he pursued the dog, which ran upon the plaintiff's premises and into the plaintiff's house. The defendant went towards the door, where the plaintiff's wife was standing, and stated that the dog had killed his chickens, and demanded him for the purpose of killing him, but she refused to give up the dog, saying "the dog is not mine." The defendant entered the doorway and took away the dog and killed him, doing no unnecessary damage to the plaintiff's

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Mulrey v. Barrow & others.

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premises. The plaintiff was the keeper of the dog, and had failed to take out a license for him or have a collar placed upon him.

The judge found as a fact that the defendant entered the plaintiff's premises without leave, for the purpose of seizing and killing the dog, and found for the plaintiff, assessing damages in the sum of one cent. The defendant alleged exceptions.

*C. W. Tuttle*, for the defendant.

*J. Rutter*, for the plaintiff.

GRAY, J. The only justification alleged by the defendant for entering the plaintiff's dwelling-house and killing his dog, is, that the dog was not licensed and collared as required by the St. of 1864, c. 299, and that by the seventh section of this statute, "any person may, and every police officer and constable shall, kill or cause to be killed all such dogs whenever and wherever found." But this statute cannot reasonably be construed as giving to every citizen a license to hunt or pursue these animals into a neighbor's dwelling-house, to the disturbance of his family and the great risk of a breach of the peace. The defendant, in entering the plaintiff's house to seize the dog after the plaintiff's wife had refused to give it up, was a trespasser, and has no ground of exception to the judgment against him for nominal damages. Whether he might have been held liable for the value of the dog also is not before us on these exceptions. See *Bishop v. Fahay*, 15 Gray.

*Exceptions overruled.*

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### TIMOTHY D. MULREY vs. JOHN T. BARROW & others.

If labor and materials have been furnished and used in the erection of a building, under an entire contract, with no stipulation for any separate price for either, and there is no mechanic's lien for the whole, there can be none for any part. If extra labor, however, has been performed, a lien for it may be enforced.

A lien may be enforced for labor performed in the erection of a house under the employment of one who has agreed with the owner of land to erect the house thereon, and to pay and discharge all claims for labor and materials furnished and used in the erection thereof, so that there shall be no liens upon the premises.

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Mulrey v. Barrow & others.

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PETITION filed November 10th 1863 to enforce a mechanic's lien on a house and land in West Roxbury. The statement of account annexed to the petition contained various items, extending from the 3d of July to the 13th of August 1863.

It was agreed in the superior court that the labor and materials mentioned in the statement were performed and furnished by the petitioner by virtue of an oral agreement with Edward H. Dorman, who had entered into a written contract with Andrew S. March, by which Dorman was within a specified time to erect a house upon a lot of land of said March, and finish the same in a specified style, and pay and discharge all claims for labor and materials furnished and used in the erection thereof so that there should be no liens upon the premises, and then March was to convey the premises to Dorman, taking a mortgage back for the value of the land, and certain advancements to be made by March to Dorman during the progress of the work. The house was built according to this contract, and on the 17th of August 1863 the premises were conveyed to Dorman, and at the same time mortgaged to the Andover Savings Bank to secure \$8000. Dorman afterwards died, and the defendants are his legal representatives.

Judgment was rendered for the respondents, and the petitioner appealed to this court.

*J. M. Keith*, for the petitioner.

*J. W. May*, for the respondents.

HOAR, J. The objection which is decisive against the petitioner's claim for a lien upon the greater part of the account appended to his petition is this, that the charges are for work and materials furnished under an entire contract, and for an entire price. As he had given no notice to the owner of the land of his intention to claim a lien for the materials before they were furnished, he has no lien for them. Gen. Sts. c. 150, § 2. And having no lien for the materials, he has none for the labor, because there was no agreement for the labor separately, nor has any sum ever become due for it. *Morrison v. Minot*, 5 Allen, 403. *Graves v. Bemis*, 8 Allen, 573.

But the second, third, ninth and eleventh items of the account



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Driscoll v. Hill.

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are for labor only, which was not performed as a part of any contract which included the furnishing of materials. It is argued for the defendants that the eleventh item, "for cleaning slabs and pointing round them," includes the supply of some small amount of material. But we do not think that it appears to be true, or that there is any reason to suppose that the material used for such a purpose would make any appreciable addition to the price of the work. For these items the petitioner is therefore entitled to enforce his lien.

The petitioner filed his statement of account in the clerk's office of Roxbury within thirty days after he ceased to labor on the building, as required by Gen. Sts. c. 150, § 5. *Hubbard v Harris*, 8 Allen, 590. The labor was performed with the consent of the owner of the building, for he had made an express agreement with Dorman that the building should be erected; and his stipulation that all liens should be discharged before he would convey the estate to Dorman obviously contemplated the creation of liens in the progress of the work.

As the estate was mortgaged, however, before the statement was recorded, the lien only attaches to the equity of redemption which Dorman held. Gen. Sts. c. 150, § 33.

*Judgment for the petitioner.*

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### JAMES DRISCOLL vs. WILLIAM H. HILL.

If labor and materials have been furnished and used in the erection of a building, and a payment has been made on general account, without discrimination as to whether the same should be applied towards the price of the labor or the price of the materials, so that it is impossible to determine how much remains due for the labor or for the materials separately, and there is no mechanic's lien for the whole, there can be none for any part.

PETITION to enforce a mechanic's lien. At the trial in the superior court, before *Rockwell, J.*, without a jury, judgment was rendered for the petitioner for the sum of \$418.51 and interest; and the case was reported for the determination of this court. The material facts are stated in the opinion.

*J. W. May*, for the respondent.

*G. Griggs*, for the petitioner.

BIGELOW, C. J. The contract under which a lien is now claimed was for materials to be furnished and labor to be performed by the plaintiff on land which at the date of the contract belonged to the defendant Hill, who alone appears to defend this action. The materials which the plaintiff was to supply consisted of powder with which stones were to be blasted, and mortar and cement with which the stones in cellars were to be laid and pointed. For these no lien is claimed, there having been no notice given to the defendant, according to Gen. Sts. c. 150, § 2. The sole question is, whether the plaintiff has established a lien for labor.

Passing over various grave objections urged in behalf of the defendant to the validity of the lien, we are of opinion that the plaintiff fails in showing that he took the essential preliminary step of filing a just and true account of the amount due to him for labor in the office of the clerk of the town where the land is situated, in compliance with the provisions contained in Gen. Sts. c. 150, § 5. The statement which the plaintiff left with the town clerk is fatally defective. It does not show how much is due to the plaintiff for labor only. It is conceded that most of the items set forth in the statement embrace the sums due for materials as well as labor, and do not of themselves show how much was due for either separately. If this difficulty could be surmounted by evidence, such as was offered at the trial, to show by estimates, approximately, the amount which would be due for labor, the defect in the statement would not be cured. On the question of the admissibility of such evidence we give no opinion. The case differs from *Morrison v. Minot*, 5 Allen, 403, and *Graves v. Bemis*, 8 Allen, 573. In those cases the contract was entire, and the sum to be paid was a round sum for labor and materials, with no stipulation for a separate price for either. But in the case at bar, for a portion of the labor to be performed under the contract, that is, for excavation of the cellars, a separate price was agreed to be paid. But the difficulty still remains, that it is impossible to ascertain, from the statement or

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Driscoll v. Hill.

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otherwise, the sum due for labor for which a lien can be asserted. The reason is this. There was a payment to the plaintiff of the sum of one hundred and forty dollars. This is credited generally on the account towards payment of the sum due for labor and materials, and it was paid during the progress of the work when there was money due for both. There is nothing to show how this is to be applied. It does not appear how much was due for labor or for materials when the payment was made. For aught that the case discloses, the money credited may have been sufficient to pay for all the labor which was performed by the plaintiff under the contract, which was to be paid for at a distinct price apart from and not including powder, mortar and other materials, and this part of the labor may have been fully performed at the time when the payment was made. Nor can we know whether the payment is to be applied to labor only, or to labor and materials; and, if to the latter, in what proportion. In short, there is nothing by which the court can determine with accuracy the amount due to the plaintiff for labor only, after deducting the amount paid to him on account. Certainly the statement does not show it, nor did the evidence adduced at the trial tend in any degree to clear up the vagueness and uncertainty of the statement, or to show the amount for which the plaintiff could rightfully claim a lien after deducting the payment. As the case stands, therefore, the statement was defective and invalid, and the inaccuracy and insufficiency cannot be supplied or corrected by evidence under Gen. Sta. c. 150, § 6, for the reason that it is now impossible to ascertain with any degree of certainty by means of evidence the amount due to the plaintiff for labor only. *Petition dismissed.*

**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME JUDICIAL COURT**  
**FOR THE**  
**COUNTY OF BRISTOL, OCTOBER TERM 1865,**  
**AT TAUNTON.**

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**PRESENT :**

HON. GEORGE T. BIGELOW,	CHIEF JUSTICE.
HON. CHARLES A. DEWEY,	} JUSTICES.
HON. EBENEZER R. HOAR,	
HON. HORACE GRAY, JR.,	
HON. JAMES D. COLT,	

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**EDMUND BRIGGS & another vs. LIGHT-BOAT UPPER CEDAR  
POINT.\***

**SAME vs. LIGHT-BOAT LOWER CEDAR POINT.**

**SAME vs. A LIGHT-BOAT NOT NAMED.**

If a vessel has been built for the United States for the purpose of being used as a floating light, under an agreement to construct and equip her according to certain specifications annexed, and to the satisfaction and approval of an agent of the United States, and to deliver her in this commonwealth, for a gross sum to be paid by the United States to the builder after her completion, and the builder has completed the same, and received the contract price, and the title to her has vested in the United States, subject to the lien, and possession has been taken of her by the United States, and the spars and rigging been put up, and the lanterns put on board and prepared for use, a lien upon her cannot be enforced in the courts of this commonwealth upon proceedings afterwards commenced, for labor and materials used in her construction.

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\* These cases were argued at Boston in March 1865.

PETITIONS for the enforcement of liens upon three vessels. After the former decision in one of these cases, reported in 7 Allen, 287, one of the cases was referred to an assessor, and the others to an auditor, upon whose reports judgments were entered in the superior court for the amounts found to be due to the petitioners; and the United States, appearing as claimants, appealed to this court. The facts are stated in the opinion.

*R. H. Dana, Jr. & T. K. Lothrop*, for the United States.

*T. D. Eliot & T. M. Stetson*, for the petitioners.

GRAY, J. The statutes of Massachusetts provide that any person to whom money is due for labor and materials furnished in the construction of a vessel in this commonwealth shall have a lien upon her, which shall be preferred to all other liens except mariners' wages, and shall continue until the debt is satisfied, unless dissolved by his failure to file in the office of the city or town clerk, within four days from the departure of the vessel from the port at which she was when the debt was contracted, a certificate, under oath, of his account, of the name of the person with whom the contract was made, the name of the owner of the vessel, if known, and the name or description of the vessel and which may be enforced by petition to the superior court, containing a statement of the labor and materials, the amount due therefor, a description of the vessel, and all other material facts and circumstances, and praying for a sale of the vessel, and the application of the proceeds to the discharge of the demand. The petition may be entered in court or filed in the clerk's office in vacation, a process of attachment issued against the vessel, and notice given to the owner thereof to appear and answer to the petition, by serving him with an attested copy of the petition and order of notice; or the petition may be inserted in a writ of original summons, with an order of attachment, and served, returned and entered like other civil actions. Gen. Sts. c. 151, §§ 12, 13, 15, 16; c. 150, § 14. The attachment may be dissolved, as in ordinary civil actions, by the owner of the property giving bond to pay the amount recovered within thirty days after final judgment. Gen. Sts. c. 151, § 15; c. 123, §§ 104-106. The court may at any time allow either party to amend

his pleadings as in actions at common law. Gen. Sts. c. 151, § 17. Any number of persons having such liens upon the same vessel may join in one petition, "and the respondent may defer, as to each petitioner." § 18.

In each of the cases now before us, the petitioners, in a petition filed in the clerk's office, alleged that by virtue of a contract with Stephen Andrews they had furnished labor and materials for and on account of a light-boat, which had been used in its construction, and for which a certain amount was now due to them; that the boat had been built and completed at New Bedford at the ship-yard of Andrews, and had never been removed thence; and that Andrews had since transferred her to the United States, who were now the owners thereof, subject to the lien of the petitioners; and the petitioners prayed for an attachment and sale of the vessel to satisfy their demand, and for notice to the said owners and all parties interested to appear and answer to the petition. The court thereupon issued a process of attachment against the vessel, and ordered notice to the United States by service on their attorney for this district. The vessel was attached and notice given accordingly; and the United States, by their attorney, appeared specially, and pleaded to the jurisdiction that, at the time of filing the petition, and long before, the vessel was the public property of the United States, and in their possession, and held and owned by them for public uses, and as an instrument employed by them for the execution of their sovereign and constitutional powers, and therefore not subject to the process or jurisdiction of the court; and, saving this plea to the jurisdiction, answered on the merits.

These cases now come before the court upon a statement of facts, of which the pleadings, the assessor's report in the first case, and auditor's reports in the two others, are made parts, and the substance of which is as follows: These three vessels were intended to be used as floating lights in the Potomac River, and were built by Andrews under an agreement made by him in writing with the United States to construct and equip three light-vessels according to the specifications attached to the agreement, and to the satisfaction and approval of the

superintendent of construction appointed by the light-house board, and to deliver them at New Bedford to the agent of that board, for a gross sum to be paid by the United States to Andrews upon his presenting certificates from such superintendent that the vessels had been completed to his satisfaction and approval. At the time of the attachment, Andrews had received the certificate of the superintendent and had been paid the contract price; on each vessel the spars and standing rigging were up, and the lanterns had been put on board and fitted for use by men sent for the purpose by the treasury department; the superintendent had received orders to fit out two of the vessels, and those two had their crew, provisions and oil on board, and their armaments ordered; but all three vessels were at the builder's wharf, and had never been in the stream; no orders were in force to send them away, and they would not have been sent away without further orders. After the attachment, the armaments were put on board, and some caulking and joiners' and carpenters' work done.

The establishment, maintenance and control of light-houses and light-vessels appropriately belong to the supreme government of the nation. At common law, no one could erect light-houses, sea-marks or beacons without authority of the king. 3 Inst. 204. 4 Inst. 148. Bac. Ab. Prerogative, B. 6. And by St. 8 Eliz. c. 13, provision was made for the erection and maintenance of beacons and sea-marks, and for punishing any one who should destroy them. By the constitution of the United States, the control of such things, as part of the power to regulate commerce, was granted to congress, who by one of their first acts assumed this duty, and provided for the support and repair, by the secretary of the treasury, of all light-houses, beacons, buoys and public piers previously placed in any bay, inlet, harbor or port, for rendering the navigation thereof easy and safe. U. S. St. 1789, c. 9; 1 U. S. Sts. at Large, 53, 54. The authority of regulating similar structures has since continued in congress, and been exercised by them from time to time. Marshall, C. J., in *Gibbons v. Ogden*, 9 Wheat. 208, 209. U. S. St. 1820, c. 113, § 7; 3 U. S. Sts. at Large, 600. U. S. St. 1836.

c. 180, § 3; 5 U. S. Sts. at Large, 292. And in 1852 a light-house board was established, attached to the treasury department, and charged with the duties of constructing, illuminating, inspecting, superintending, supplying and repairing the light-houses, light-vessels, beacons, buoys and sea-marks of the United States. U. S. St. 1852, c. 112, §§ 8-17; 10 U. S. Sts. at Large, 119, 120. The existing regulations of the treasury department contain specific directions as to the construction, placing, lights, marks, management and inspection of light-vessels; and specially require that "when a light-vessel, designed for a new light-station, is sufficiently far advanced in construction and equipments to enable the inspector to determine at about what time it will be ready for placing at the light-station, he will prepare and transmit to the light-house board a detailed description of the hull, spars, moorings, illuminating apparatus and day-marks, with a general description of the station to be occupied, and report on or about what day the light may be exhibited;" and that "when the requisite detailed information for preparing the notice of the proposed placing of a light-vessel can be had in advance, it will be transmitted to the light-house board before the vessel is placed at the station." Treasury Regulations of 1857, arts. 1006-1030.

The condition of these three light-boats, when attached in these suits, was briefly this: They had been built for the United States, and accepted and paid for by them, for aught that appears, without any knowledge of the petitioners' lien. The title, as is directly alleged in the petitions, had vested in the United States, subject to the lien. The United States had taken possession of the vessels, and had put on board and fitted for use the lanterns, for the very purpose of carrying which the boats had been built, and which were the distinctive badge of the public service in which they were to be employed.

The question which has now been argued is not of the petitioners' title, but of the mode of asserting it; not of right, but of remedy. The United States do not now deny that they took their title subject to the lien of the petitioners. That point was determined by this court, after full consideration, upon the



former argument of one of these cases. *Briggs v. Light-Boat*, 7 Allen, 287. See also *Vanderwater v. Mills*, 19 How. 89, 90.

At that argument, the attention of counsel was chiefly, and of the court exclusively, directed to the question of title; it was assumed by the court that the lien carried with it the right to maintain this process; the effect of the possession of the United States upon the possibility of enforcing the lien in this form of proceeding, although involved in the ruling which the superior court had made at the trial, was not considered; and it was by inadvertence, that, following the terms of the report on which the case had been reserved, the court, upon setting aside the verdict for the respondents, directed judgment for the petitioners, and referred the case to an assessor to ascertain and report the amount of the petitioners' claim. The objection that the relation of the United States to this property and these proceedings is such as to take the matter out of the jurisdiction of the state courts, was raised by the United States at the outset, and strikes at the root of these petitions. It is fairly presented by the statement of facts, has been elaborately and ably argued, and must be disposed of before final judgment can be entered. Under such circumstances, the direction given to one of these cases after the previous hearing cannot preclude or excuse us from the most careful consideration of the question whether we have really any power to order a sale of this property as prayed for. And after thorough investigation and mature advisement, it is the unanimous opinion of the court that the difficulties in the way of maintaining these proceedings are insuperable.

It is an elementary and familiar principle of English and American constitutional law, that no direct suit can be brought against the sovereign in his own courts without his consent. In the older books, this is often put upon the technical ground that, all judicial writs being in the name of the king as the fountain of justice, the king cannot by his own writ command himself. But the broader reason is, that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right, at the will of

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Briggs & another v. Light-Boats.

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any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on the government in war and peace, and the money in his treasury.

These are not suits against public officers merely; but are brought against the government itself, as directly as any legal proceeding could be to assert a title or lien in, or obtain possession of, specific property. The United States are alleged in the petitions to be the owners of the vessels. The statutes of the Commonwealth require, and these petitions pray, that notice should issue to them, "that they may appear and answer thereto." Gen. Sts. c. 150, § 14; c. 151, § 15. It is pursuant to such a notice that they have appeared and pleaded to the jurisdiction.

This is not a case in which notice issues to the government in order that it may, at its election, come in and claim a right to property in the possession of an individual, or of the court. When these suits were begun, the vessels, though the petitioners had an interest in them by way of lien, were the lawful property of the United States, and in their possession. No other person was named in the petitions, or has appeared in court, as a defendant.

Nor is this case like one in which the government has, by bringing a civil action to enforce its own rights to property in the possession of an individual, submitted itself to the jurisdiction of the court, and, being itself the actor, needs the assistance of the court to recover its property.

The United States have never, by general statute or special order, submitted themselves or their rights in this matter to the jurisdiction of the state courts. But, on the contrary, as soon as notified of these petitions, and before answering on the merits, they filed a special appearance, and a plea distinctly setting forth the grounds on which they claimed exemption from the state process.

These vessels were not held by the United States, as property might perhaps be held by a monarch, in a private or personal, rather than in a public or political character. It is difficult to see how the government of a republic can hold any property for

personal or private purposes. But these light-boats were built and held for public objects only, and were unsuitable for any other. They were, in the precise and emphatic language of the plea to the jurisdiction, "held and owned by the United States for public uses, and as instruments for the execution of their sovereign and constitutional powers."

The government thus summoned in as a defendant, and from whose possession these vessels are sought to be wrested by the order of this court, is not the government of the state by whose constitution and laws this court is established and the tenure of office of its judges secured. But it is the supreme government of the nation, to which paramount powers of regulating commerce, with foreign nations and between the several states, in peace and war, have been surrendered by the constitution of the United States.

Here was no taking by right of eminent domain, or claim of military necessity, or in any forcible manner, from the persons having liens. Neither, on the other hand, was there a seizure by judicial process of the United States, in order to try a controverted question. But the property was, in its very mode of structure, manifestly intended for the use of the United States. It was delivered to them by the contractor according to the terms of his agreement with them, and the price paid by them to him. The petitioners suffered the title to pass, and the possession to be delivered, to the United States, before they took one step in the state courts to establish their lien. If they had filed their petitions and attached the vessels before these came into the possession of the United States, they might well have contended that the courts of the Commonwealth had acquired a jurisdiction of the cases, which could not be divested until the object of the suits was accomplished.

This process does not wait for final adjudication of the rights of the parties, before it takes the property out of the hands of its owner and possessor; but assumes the custody at the very first stage of the proceedings. And thus, if these petitions can be sustained, any attorney of a state court may cause a public vessel of the United States to be taken out of their possession:

without any previous judicial investigation of the petitioner's claim, and at a moment when the exigencies of the public service, known only to the executive department, and which may not safely be disclosed, require its immediate dispatch to a distant station.

The object of this proceeding is not to vest the property in the petitioners, but to have it sold for the payment of their claim; and the whole property, including the title of the United States, is attached and held as security for such payment. No other form of judicial process has been brought to our notice, in which property held by the United States can be attached as security for the payment of any debt, either of themselves or another.

The United States could not, according to these statutes, be restored to the possession of the vessels until after final judgment, except by giving a bond to dissolve the attachment and to pay the amount of any judgment which the petitioners might recover. It is not pretended that any action could be maintained upon such a bond. It would be a most anomalous mode of proceeding, to maintain a suit to compel the United States to give a bond, upon which, when given, no action would lie.

It is said for the petitioners that these light-boats were not upon their stations, and that they were not intended for military service. But after they had once come into the possession of the United States for public uses, whether remaining at the builder's wharf, or at the station of their final anchorage, or on their way from one to the other, they were subject to the exclusive control of the executive government of the United States, and could not be interfered with by state process. The immunity from such interference arises, not because they are instruments of war, but because they are instruments of sovereignty; and does not depend on the extent or manner of their actual use at any particular moment, but on the purpose to which they are devoted. Neither the comparative importance of the different sovereign powers of the United States, nor the management of the instruments of either, when not used so as to injure any citizen, has been submitted to the judgment of the state courts.

These reasons have satisfied us that there is no principle upon which the courts of this commonwealth can entertain jurisdiction of these petitions. A careful examination of all the authorities cited at the bar, and some additional research, have confirmed this opinion. We shall state the result of this investigation with more fulness and detail than would be admissible in a case of less interest and moment.

The petitioners contend that at common law the sovereign could be sued without his consent. But it is, to say the least, very doubtful whether this position can be maintained. The earliest assertion, in an English law book, of the king's liability to an action is probably the statement in the *Mirror of Justices*, compiled by Andrew Horne in the reign of Edward I or Edward II, that, at some time between the reigns of Alfred and Edward I, "it was ordained, that the king's courts should be open to all complaints, by which they had original writs without delay, as well against the king or the queen, as against any other of the people, for every injury but in case of life, when the complaint held without writ." And in the chapter on "abusions of the common law," it is complained that "the first and chief abusion is, that the king is above the law, whereas he ought to be subject to it, as it is contained in his oath." *Mirror*, c. 1, § 3; c. 5, § 1. But the *Mirror* is of no great authority in matters of earlier history. 2 *Palgrave's English Commonwealth*, 113, 114. 2 *Reeve's Hist. Eng. Law*, 358, 359.

The later statements of the same doctrine are based upon three cases in the *Year Books of Edward III.*, which, when critically examined, hardly warrant the inference, and in none of them was the point in issue or adjudged. The first was of a writ of error granted by the king, on petition, to Sir William Thorp, C. J. K. B., upon a judgment rendered in parliament for the king; "the king assigned certain earls and barons, and with them the justices, &c. to determine the said business," before whom "it was alleged" that the judgment could not be reversed except in parliament, and that, since the parliament was now ended, ("the deputies remained, but the king himself was gone,") nothing further could be done. "And it was said," (whether by

court, or counsel, or in some book cited, does not appear, but there is a curious resemblance between some of the words and those above quoted from the Mirror,) "that the king made the laws by the assent of the peers and of the commons, and not by the peers and the commons; and that he had no peer in his own land; and that the king ought not to be judged by them; and that in the time of King Henry, and before, the king was impleaded as would be another man of the people; but Edward the king his son ordained that a man should sue the king by petition; but kings should never be judged except by themselves and their justices." 22 Ed. III. 3, pl. 25. & C. in Fitz. Ab. Error, 8. The second is a mere *dictum* of Wilughby, J., who in an action brought by, not against, the king, and after speaking of a petition of right, remarked, "I have lately seen such a writ, *Præcipe Henrico Regi Angliæ, &c.*, instead of which is now given petition by his prerogative." 24 Ed. III. 55, pl. 40. The third is but a statement of counsel in argument. In defending an action brought by the king to recover an advowson, which was appurtenant to a manor granted by King Henry III., but not mentioned in the grant, Cavendish said that "in the time of King Henry, the king was but as a common person, for in that time a man could have a writ of entry *sur disseisin* against the king, and all other kinds of actions, as against another person;" and that before the *St. de Prærogativa Regis* the king's grant, like any other person's, included all fees, advowsons and other appurtenances, though not expressly mentioned. The court gave judgment for the defendant upon the last ground. 43 Ed. III. 22, pl. 12. *Whistler's case*, 10 Co. 64 a. It would be difficult to infer from anything said by the judges in these cases, that, either by petition of right, or by writ, a suit could have been brought against the king without his leave.

On the other hand, Bracton, who lived and wrote in the reign of Henry III., repeatedly asserts that a writ does not run against the king. Bract. 5 b, 171 b. He also says that it follows that the king cannot be vouched to warranty, without his consent; and cites cases in which this had been adjudged. Bract. 261 a, 270 b, 382 b. And this last position is recognized and affirmed

in c. 1 of St. 4 Ed. I., St. 2, commonly called *St. de Bigamis* and in the legal treatises of this reign. 2 Inst. 268. Fleta (Selden's ed.) 285, 294. Britton, 138 a, 200 b, 216 b. Lord Coke says that before a remedy against sheriffs or other bailiffs of the king was given by St. 3 Ed. I. c. 24, a subject whose freehold was seized into the king's hands by one of those officers, "to his intolerable vexation and delay, was put to his suit to the king by petition." 2 Inst. 206. See Bract. 212 a. And Coke reports that while he was at the bar it was resolved by all the judges that at the common law, in all cases where the king was seised of any estate of inheritance or freehold by any matter of record, he who had right "was put to his petition of right, (in nature of his real action which he could not have against the king, because the king by his writ cannot command himself,) to be restored to his freehold and inheritance." *Sadlers' case*, 4 Co. 54 b, 55 a. The passages quoted by the learned counsel for the petitioners from Bracton and Fleta, as to the control which the king's court might exercise over him, manifestly refer to legislative and not judicial control, in parliament and not in the ordinary courts of justice. Bract. 34. Fleta, 17. 1 Spence on Eq. 125, note. 2 Hallam's Middle Ages, c. 8, pt. 2, (10th ed.) 332 and note, rejecting the theory of Allen on the Prerogative, (2d ed.) 94-97, cited for the petitioners. And the accuracy of the statements in the Year Books of Edward III. has been doubted or denied by such high authorities in the law as Chief Justice Brooke, his colleague Staunford, John Selden, and Chief Justice Erle. Bro. Ab. Petition, 12; Prerogative, 2, 31. Staunford on the Prærogative, 42. Titles of Honour, Additions No. 275; 3 Selden's Works, 1048. *Tobin v. The Queen*, 16 C. B. (N. S.) 356, 357.

The petitioners also cited Rolle's abstract of the argument delivered in the king's bench by Sir Francis Bacon, as attorney general, upon the writ *de rege inconsulto*, in which he is reported to have said, "The matter is, How the king is to be made a party? That will not be in this court by *Præcipe Jacobo Regi* as he was in ancient times." *Brownloe v. Michell*, 1 Rol. R. 290. But Bacon's argument, as prepared by himself in writing

gives a different color to the suggestion. "This foundation being laid, that the king must be made party, then followeth the third point, which is, How he shall be made party? It follows therefore of itself, *ex quiddam necessitate adamantinâ*, that the case can be no longer held in the common pleas or this court, for you will not revive old fables (as Justinian calls things of that nature,) *Præcipe Henrico regi, &c., Præcipe Jacobo regi, &c.* That you will not do; and yet it comes to that, if the king should be made a defender in this court, either directly or indirectly." 1 Coll. Jurid. 176. 7 Bacon's Works, (ed. 1859,) 683, 694.

During the reigns of the earlier Plantagenets, the jurisdiction of the courts depended more or less on the king's pleasure, the king sometimes administered justice in person, and the forms of proceeding between subject and subject were quite unsettled. Glanville, lib. 1, cc. 4-6; lib. 12, c. 25. 1 Palgrave's English Commonwealth, 291, 292. 2 Ib. 68, 69. Ryley Pl. Parl. 442, 459. 1 Spence on Eq. 111-127. *Tobin v. The Queen*, above cited. And the exorbitant fines paid to the king to obtain justice occasioned the provision in Magna Charta — *Nulli vendemus justitiam*. 1 Hale's Hist. Com. Law, (5th ed.) 263. Madox Hist. Exch. c. 12. Doct. & Stud. dial. 1, c. 8. It can hardly be believed that the subject could have a writ as of course against the king, when he was dependent on the king's favor for the right to sue a fellow-subject.

If actions were maintained against the king in the reigns of John and Henry III., it would not have much weight in ascertaining the lawful extent of the royal prerogative, so great was the power at times exercised by the barons over the crown. The Magna Charta of King John provided that in case of a breach of its provisions by the king, a certain number of the barons, chosen by themselves, "together with the commons of the whole realm, should distress and harass him in every way possible, to wit, by taking of castles, lands and possessions, and other ways possible, until it should be redressed according to their judgment," saving only the persons of the king and the royal family. 1 Statutes of the Realm, 8. And see Acts 42 H. III., 1 Rymer's Fœdera, (Record Commission ed.) 371, 377, 381.



But the question whether the king of England could be sued at common law is rather a matter of historical interest than of present application; for all the books agree that it has not been allowed since the reign of Edward I. See authorities above cited, and also Com. Dig. Action, C. 1; Prærogative, D. 78; Bac. Ab. Prærogative, E. 7; Year Book, 30 Ed. I., 171, 173, 189; *The case of the Constable of England*, Keilw. 171 b, 172 a.

It has been said that "replevin lies against the king, if goods be in his hands." Com. Dig. Replevin, D. Manning's Exch. Pract. Rev. (2d ed.) 89. But this statement is founded on nothing but a speech, reported in 2 Rushworth's Hist. Coll. 1361, and better in 4 Somers's Tracts, 301, of Edward Hyde (afterwards Lord Clarendon) to the house of lords on the impeachment of the barons of the exchequer, who had issued injunctions thirteen years before to stay such writs brought against officers of the customs by the owners of goods seized for duties. And the reasons given by the court of exchequer to the house of commons at that time fully justify their action. "Whereas the said owners endeavored to take the same goods out of the king's actual possession by writs or complaints of replevin, which was no lawful action or course in the king's case, nor agreeable to his royal prerogative, therefore the said court of exchequer, being the court for ordering the king's revenue, did by those orders and injunctions stay those suits, and did fully declare by the said orders that the owners, if they conceived themselves wronged, might take such remedy as the law alloweth." 1 Rushworth's Hist. Coll. 666. And see *Cawthorne v. Campbell*, 1 Anstr. 205 note; Madox Hist. Exch. c. 23, § 15; Manning's Exch. Pract. Rev. 190, and note m; Com. Dig. Courts, D. 2, 7; 20 Ed. I., 87.

The rule in chancery is the same as at law, as is shown by the case of *Reeve v. Attorney General*, cited for the petitioners. There lands were devised to the testator's widow for life, and after her death to be sold and the money divided among the plaintiffs; the land, for want of heirs of the testator, escheated to the crown; and a bill brought against the attorney general who was made defendant in behalf of the crown, to have the lands sold, was dismissed by Lord Chancellor Hardwicke, who

said, according to one report, that "where the crown was trustee, the court has no jurisdiction to decree a conveyance, but they must go to a petition of right;" 1 Ves. Sen. 446; or, as elsewhere reported, that he could not make such a decree, but the court of exchequer might, as it was a court of revenue. 2 Atk. 223. In the great case of *Penn v. Lord Baltimore*, after the attorney general had been made a party, Lord Hardwicke decreed a specific performance of articles executed in England concerning the boundaries of the Provinces of Pennsylvania and Maryland; but without prejudice to any prerogative, right or interest of the crown. 1 Ves. Sen. 454, 455, and Belt's Suppt. 198. In a later case, Lord Northington, "upon very diligent search and consideration," and after consulting Lord Mansfield and Sir Thomas Clarke, M. R., thought "the arms of equity were very short against the prerogative." *Burgess v. Wheate*, 1 Eden R. 255. See also Lord Redesdale in *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 617; Mitf. Ch. Pl. (4th ed.) 31.

In the ecclesiastical court, an application for process calling upon the king's proctor, for and on behalf of the reigning king, as heir and successor of the late king, to see a testamentary paper of his propounded and proved, was rejected by Sir John Nicholl, upon the ground that it was, "in substance, not merely a proceeding to try the validity of the will of his late majesty, but a proceeding against the reigning sovereign—a demand upon his majesty, which is to be enforced, adversely, against him." *In the goods of King George III.*, 1 Addams, 255, 266.

A petition of right cannot be prosecuted without leave first obtained from the sovereign, and then only in the court indicated in the royal fiat, which the law will not presume will be capriciously refused. Staunford on the Prærogative, 73. 1 Bl. Com. 243. *Clayton v. Attorney General*, 1 Coop. temp. Cottenham, 120. *In re Pering*, 2 M. & W. 873. *Ryves v. Duke of Wellington*, 9 Beav. 600, 601. After leave once granted, the cause proceeds like an ordinary suit; and all defences of law or fact are open to the crown. *Baron de Bode's case*, 2 Phillips R. 85; S. C. 8 Q. B. 208; 13 Q. B. 364; 3 H. L. Cas. 449. By final judgment for the petitioner, and not before, the possession

of the crown is terminated. 3 Bl. Com. 257. The petition of right, after being disused for centuries, was revived in England about thirty years ago, and afterwards resorted to so frequently that it became the practice for the secretary of state for the home department, as a matter of course, to indorse "Let right be done." Jervis, C. J. in *Eastern Archipelago Co. v. The Queen*, 2 El. & Bl. 914. But the recent English statute, regulating this mode of proceeding, still recognizes the royal prerogative, by directing the home secretary to submit the petition "for her majesty's gracious consideration, and in order that her majesty, if she think fit, may grant her fiat that right be done." *St.* 23 & 24 Vict. c. 34, § 2. *Irwin v. Grey*, 3 Fost. & Finl. 635. *Tobin v. The Queen*, 14 C. B. (N. S.) 521, 522.

The only other mode, known to the law of England, in which a subject could assert a title by legal proceedings against the king, was either by *monstrans de droit* or manifestation or plea of right, or by traverse of an inquisition or office found for the king. But each of these was in the form of a plea, beginning with the words *Et modo ad hunc diem venit et pro placito, &c.*, both appear to have been used only in answer to proceedings instituted by the king for seizing property into his hands; and the judgment, if in favor of the subject, was simply *quod manus domini a possessione amoveantur*. *Sadlers' case*, 4 Co. 54; *S. C.* Co. Entr. 402. Jenk. 78. Com. Dig. Prærogative, D. 81-84. Manning's Exch. Pract. Rev. 87, 88, 89. *People v. Cutting*, 3 Johns. 6, 7.

The English revenue cases, cited for the petitioners, were of this character, in which inquisitions had been taken upon extents sued out by the king against crown debtors. The factor's and wharfinger's liens which were maintained against the crown were created before the teste of the extent, and pleaded by way of traverse of the inquisition. *The King v. Lee*, 6 Price, 369. *The King v. Humphery*, McClel. & Y. 173. The passage cited from Bro. Ab. Pledges, 31, that "if a man pledge his goods and afterwards is attainted of felony, the king shall not have the goods pledged without paying the sum for which they were pledged," goes no farther. In *Cusberd v Attorney General*,

6 Price, 411, the estate of a crown debtor had been seized upon an extent, and ordered by the court of exchequer to be sold; and Chief Baron Richards, in maintaining a bill in equity by an equitable mortgagee to be first satisfied out of the proceeds, said: "I do not know, if the crown had had the legal estate here, how I should have got it out of the crown's hands for the benefit of the person who would have been a *cestui que trust*."

6 Price, 463. The case of *Poole v. Attorney General*, Parker, 272, is to the same effect.

Like decisions have been made by judges of the same court, sitting in equity, in cases of forfeitures for treason or felony. In the reign of Charles II., when lands had come into the king's actual possession upon the attain of the mortgagee for high treason, Lord Hale said, "In natural justice redemption of a mortgage lies against the king;" yet expressed the opinion that a bill in equity could not be maintained to compel the king to reconvey, but the only remedy was by "*an amoveas manum*." Baron Atkyns dissented, and no final decree appears to have been made. *Pawlett v. Attorney General*, Hardr. 467, 469. S. C. cited in 1 Eden R. 205, 255. But early in the next century, upon a bill against the attorney general to foreclose a mortgage after the attain of the mortgagor for high treason, the court, as reported by Lord Hardwicke, then attorney general, "would not decree a foreclosure against the crown, but directed that the mortgagee should hold and enjoy the mortgaged premises till the crown thought proper to redeem the estate." *Lutwich v. Attorney General*, cited in 2 Atk. 223. On a similar bill by equitable mortgagees of the estate of one convicted of felony, Baron Alderson decreed that the plaintiffs should hold possession of the property until the heir was satisfied, but declined to order a sale, because the legal estate was in the crown. *Hodge v. Attorney General*, 3 Yo. & Col. Exch. 342. In these two cases, the king had manifestly neither made an entry, nor sued out a writ of escheat, one or the other of which was necessary to perfect his title. 2 Bl. Com. 445. See also *Rogers v. Maule*, 1 Yo. & Col. Ch. 4, in which the decree made was by consent of the attorney general; *Wikes's case*, Lane, 54.

In the celebrated *Case of the Bankers*, 14 Howell's State Trials, 1, the house of lords, affirming the judgment of the court of exchequer, and following the opinion of Lord Holt and a majority of the judges, ordered payment out of the exchequer of the arrears of annuities granted by Charles II. chargeable upon the hereditary revenue of excise in consideration of large loans of money from the bankers. But the original royal grant contained express directions to the officers of the exchequer from time to time to pay the arrears of the annuities out of the funds in the exchequer, without further orders; the opinions given in favor of the bankers rested upon the peculiar powers of the barons of the exchequer over the revenue, such as no court has in this country; and the judgment was opposed to the great authority and profound constitutional learning of Lord Somers. No instance has been found, in which either the court of exchequer or any other English court has maintained a suit against the king, except either by his consent, or in answer to a proceeding instituted by himself.

In the United States, it has always been held an essential attribute of sovereignty in a state not to be liable to be sued without its own consent; and that consent has not usually been given except in special cases. The law of this commonwealth affords sufficient examples. The general principle that the state cannot be sued, at law or in equity, is perfectly well settled. *Commonwealth v. André's Heirs*, 3 Pick. 225. *Pingree v. Coffin*, 12 Gray, 321. The best example for our present purpose is the decision of this court that the interest in the nature of dower, given by the St. of April 30th 1779, c. 9, § 4, to widows whose husbands' property had been confiscated to the state, needed an express provision to authorize the courts to set it off, because, in the words of Chief Justice Parsons, "the government being the tenant of the freehold, they could have no remedy at law to obtain an assignment of dower, but must have relied on the justice of the government." *Sewall v. Lee*, 9 Mass. 370. The saying of Lord Hale, that "in natural justice redemption of a mortgage lies against the king," has been put in practice here by authorizing suits to be brought against the Commonwealth

for the redemption of mortgages made or assigned to it. *St* 1804, c. 103, § 2. *Rev. Sts. c. 107, §§ 38, 39, and commissioners' notes. Gen. Sts. c. 140, § 48.* The Massachusetts statutes concerning escheats well illustrate the nature of the English remedies against the crown, already mentioned. The inquest of office necessary to vest the title in the state is upon information by the attorney general, to which any person, though not named therein nor served with process, may appear and answer; and if judgment is rendered for the Commonwealth, any one who has not been served with process or appeared may, within the period of limitation of real actions, bring a writ of entry against the Commonwealth, its tenant or grantee, and deny and disprove any facts alleged in the first suit, and also allege and prove any other facts in support of his claim, and, if entitled to the premises, have judgment and execution therefor in common form. *Wilbur v. Tobey*, 16 Pick. 180. *Rev. Sts. c. 108. Gen. Sts. c. 141.* The defence to the original proceeding resembles the traverse of office or *monstrans de droit*; and the subsequent suit, after the estate has vested in the Commonwealth, "answers," in the words of the commissioners on the Revised Statutes, "to the petition of right at common law." *Rep. of Commissioners on Rev. Sts. c. 108, §§ 13, 14, note.*

The constitution of the United States, as originally adopted, gave to the federal courts jurisdiction both of "controversies between two or more states," (which could not be judicially determined otherwise than in the national tribunals,) and of those "between a state and citizens of another state." But Hamilton, Madison and Marshall originally maintained that this last clause must be limited to suits in which a state was plaintiff. *Federalist*, No. 81. *Debates in Virginia Convention of 1788, 3 Elliot's Debates, (2d ed.) 533, 555, 556.* The judgment of a majority of the supreme court, giving it a wider meaning, created so much dissatisfaction, that the constitution was immediately amended by declaring that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or citizens or subjects of

any foreign state;" and no suit has since been brought by an individual against a state in the United States courts. *Chisholm v. Georgia*, 2 Dall. 419. U. S. Constitution, amendment 11 *Cohens v. Virginia*, 6 Wheat. 406, 407. *Ex parte Madrazzo*, 7 Pet. 627. The suits in which the supreme court of the United States has taken jurisdiction of a writ of error by an individual against a state to reverse a judgment of a state court have been either originally brought by the state, or brought against the state in its own courts by its own consent given by its constitution and laws. *Cohens v. Virginia*, 6 Wheat. 264. *Curran v. Arkansas*, 15 How. 304.

It is equally well settled that, without the assent of the United States, no action at law can be maintained against them in their own courts; nor a bill in equity to restrain the United States from collecting a judgment obtained at law, even on the ground that it has since been paid. *United States v. Clarke*, 8 Pet. 444. *United States v. M'Lemore*, 4 How. 286. *Hill v. United States*, 9 How. 386. *Reeside v. Walker*, 11 How. 290. *Nations v. Johnson*, 24 How. 204. In the first of these cases, Chief Justice Marshall said: "As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of congress, or the court cannot exercise jurisdiction over it." Such authority has been given in a few classes of cases, most commonly in those analogous to proceedings in the English exchequer as a court of revenue, or concerning claims to property acquired by the United States by treaty. From an early period, set-offs, legal and equitable, have been allowed in suits brought by the United States. *St.* 1797, c. 20; 1 U. S. Sts. at Large, 512. *Gratiot v. United States*, 15 Pet. 370; *S. C.* 4 How. 80. *United States v. Bank of Metropolis*, 15 Pet. 403. By the act of 1820, c. 107, upon the issue of a warrant of distress against a delinquent receiver of public money, he might have a bill in equity against the United States in the district court. 3 U. S. Sts. at Large 592. *United States v. Nourse*, 6 Pet. 470; *S. C.* 9 Pet. 8. *Murray v. Hoboken Land Co.* 18 How. 283, 284. By the act of 1822, c. 96, §§ 6-9, the proprietors of land taken and sold to

make certain public improvements in the city of Washington were "permitted and authorized to institute a bill in equity in the nature of a petition of right against the United States." 3 U. S. Sts. at Large, 692, 693. *Van Ness v. City of Washington*, 4 Pet. 276, 277. By the act of 1849, c. 107, § 8, suits in equity might be brought to enforce claims to share in the money received from Mexico under the treaty of Guadalupe Hidalgo, and any injunction thereupon granted by the court was to be respected by the treasury department. 9 U. S. Sts. at Large, 94. *Clark v. Clark*, 17 How. 317, 320. And several acts of congress have authorized petitions against the United States in their own courts to assert rights under grants from foreign governments in lands since ceded by those governments to the United States. But the only general provision made by congress for a trial of claims against the United States has been by the acts establishing a court of claims, providing a mode of proceeding by petition, and declaring a copy of a judgment for any petitioner to be a sufficient warrant to the secretary of the treasury to pay the amount out of any appropriation made by congress for the payment of private claims. No authority has been given to issue compulsory process against the United States for the payment of any claim, and the court of claims has been held by the supreme court not to be a judicial tribunal from which an appeal could be taken to that court, although such an appeal was given in terms by the statutes. U. S. St. 1855, c. 122; 10 U. S. Sts. at Large, 612. U. S. St. 1863, c. 92; 12 U. S. Sts. at Large, 765. *Gordon v. United States*, 14 Amer. Law Reg. 111; S. C. 2 Wallace, 561.

The act of congress of June 11th 1864, c. 117, passed while these suits were pending, authorizing the secretary of the treasury to cause a stipulation, to the extent of the value of the interest of the United States, to be made for the discharge of any property owned or held by the United States and seized or attached in judicial proceedings under the laws of a state, (as has since been done in these cases,) and defining the effect of a final judgment for the plaintiff after a stipulation so given, expressly provides that "nothing herein contained shall be considered as



recognizing or conceding any right to enforce by seizure, arrest, attachment or any judicial process, any claim against any property of the United States, or against any property held, owned or employed by the United States, or by any department thereof, for any public use, or as waiving any objection to any proceeding instituted to enforce any such claim." 13 U. S. Sta. at Large, 123.

The case of *Florida v. Georgia*, 17 How. 478, was a suit brought by one state against another to settle a disputed boundary; a majority of the supreme court, while allowing the attorney general to appear and adduce proofs in behalf of the United States, still held that no judgment could be given against the United States; and four dissenting justices were of opinion that the United States could not take any part in the case. In the New York cases cited for the petitioners, a state was made a party defendant merely for the purpose of enabling it to protect its rights, and it was admitted that no compulsory decree could be made against it. *Garr v. Bright*, 1 Barb. Ch. 157. *Manning v. Nicaragua*, 14 How. Pract. R. 517. See also *United States v. Peters*, 5 Cranch, 139; *Duke of Brunswick v. King of Hanover*, 6 Beav. 39.

Two other opinions of the supreme court strongly tend to support the position here taken by the United States, although each perhaps went beyond what was absolutely necessary to the judgment. In *Harris v. Dennie*, 3 Pet. 292, foreign goods, still in the vessel in which they had been imported, and in the possession of the collector of the customs, who had refused security offered for the payment of the duties thereon, were held not to be liable to attachment on a writ from the state courts against the importer. Mr. Justice Story, who delivered the opinion of the court, after alluding to the provisions of the act of congress of 1799, c. 128, (sess. 3, c. 22,) prohibiting the unlading or removal of goods without a custom-house permit, laid down this broad position: "From the moment of the arrival in port, the goods are, in legal contemplation, in the custody of the United States, and every proceeding which interferes with or obstructs or controls that custody is a virtual violation of the provisions of the

act." 3 Pet. 304. In *Buchanan v. Alexander*, 4 How. 20, it was held that money in the hands of a purser in the navy, due to seamen for their wages, could not be attached by process from the state courts; and this not solely upon the ground that the purser was not the debtor of the seamen, but also because "the funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted or defeated by state process or otherwise, the functions of the government may be suspended."

But the most direct authorities upon the question under examination are to be found in the courts of admiralty, from which this kind of remedy is derived.

*The Betsey* and *The Rising States*, cited by the learned counsel for the petitioners, decided in the English court of admiralty in 1777, and briefly reported in Marriott R. 90, 92, were cases of recaptures from the Americans during the Revolutionary War, and arose under the act of parliament of 1775, known as the American Prohibitory Bill. That act provided that the captors of ships and cargoes belonging to the inhabitants of the revolted colonies should have the sole property in them, "being first adjudged lawful prize in any of his majesty's courts of admiralty;" and that if any ship taken as prize, or any goods therein, should appear and be proved in the court of admiralty "to have belonged to any of his majesty's subjects" remaining in their allegiance, taken by the enemy and retaken, they should by decree in admiralty be adjudged to be restored to their former owners, they paying one eighth part of their value in lieu of salvage to the recaptors. St. 16 Geo. III. c. 5, §§ 2, 24. The cases in Marriott must therefore have been prize proceedings by recaptors to perfect their right or interest in property in their own hands, of which the navy board or the king's proctor came in as claimant; not suits by a private person to enforce a lien on property in the possession of the crown; and it was justly held that upon a liberal construction of the statute, and by the general principles of admiralty law, the king could not have restitution of his transport ship or his stores, without paying to the libellants the military salvage for

recapture. In the United States, salvage is allowed in such cases by statute. U. S. St. 1800, c. 14, § 2; 2 U. S. Sts. at Large, 17. St. 1864, c. 174, § 29; 13 U. S. Sts. at Large, 314.

*The Copenhagen*, 1 C. Rob. 289, was a prize cause, in which both ship and cargo had been restored to the claimants; and the only questions reported concerned the settlement of accounts between the owners of the ship and the owners of the cargo, in which neither the sovereign nor the captors had any interest.

In *The Lord Nelson*, Edw. Adm. 79, civil salvage was allowed on the instance side of the court of admiralty against a government transport. But she had been captured and abandoned by the enemy, and found by the salvors in the situation of a derelict, not in the possession of the crown; nor does the report show that she was crown property; she may have been the property of subjects, which had been chartered by the government. And no question of jurisdiction seems to have been raised.

Whenever the question has been raised, courts of admiralty have generally declined to take jurisdiction of a libel *in rem* against a public ship, without the consent of the government.

Seamen's wages, which are preferred claims, as well under the general maritime law, as by the express words of the statute on which these petitions are founded, cannot be enforced against a government vessel. In a case before Judge Hopkinson in the admiralty court of Pennsylvania, during the war of the Revolution, "on a plea to the jurisdiction, it was adjudged, that mariners enlisting on board a ship of war, or vessel belonging to a sovereign independent state, cannot libel against the ship for wages due." *De Moitez v. The South Carolina*, Bee, 422. On a libel in the English court of admiralty to enforce a lien for seamen's wages against a packet employed in the service of the general post-office, though owned by private individuals, Sir William Scott said that he could not but be alarmed at the danger which he apprehended might arise to the public service from the detention of vessels of this kind; and would not assume jurisdiction until informed that the post-office made no objection. *The Lord Hobart*, 2 Dods. 103.

Even for salvage services, but for which a public ship might have been utterly lost to the government, no suit can be maintained. Sir William Scott, as was stated in his presence by the king's advocate, Sir Christopher Robinson, without contradiction, declined to entertain libels for salvage against an English vessel of war. *The Comus*, cited in 2 Dods. 464. In the case of a ship chartered by the government, and having on board a lieutenant in charge of naval and ordnance stores, and some invalid soldiers, when a suit for salvage was brought against ship, cargo and freight, and appearance entered and bail given for ship and freight only, it appearing that the libellants' services had been of great merit and risk, Sir John Nicholl expressed an opinion that there ought to be a remuneration in respect of the stores, and suspended the hearing in order that the matter might be represented to the lords of the admiralty, who thereupon submitted the amount of salvage on the stores to the jurisdiction of the court. *The Marquis of Huntly*, 3 Hagg. Adm. 247. So in the district court of the United States in Florida, Judge Marvin held that the mails could not be arrested or detained for salvage. *The Schooner Merchant*, cited in Marvin on Wreck & Salvage, § 122. And in a very recent case in the district court of the United States for the southern district of New York, Judge Shipman, after careful consideration of previous decisions, held that a libel for salvage could not be maintained against a ship owned, manned, supplied and armed by the United States, though not commissioned in the navy, but used as a transport. *The Thomas A. Scott*, 10 Law Times, (N. S.) 726.

The same rule and practice have prevailed in suits in the nature of proceedings *in rem* for collision, when by mismanagement of a public ship a private vessel has been injured. Dr. Lushington declined to take jurisdiction, except on voluntary appearance in behalf of the lords of the admiralty, of a suit for collision against a troop ship of the crown, and said that Lord Stowell had declined to issue a monition in a similar case. *The Athol*, 1 W. Rob. 379. In the subsequent case of *The Birkenhead*, 3 W. Rob. 75, in which Dr. Lushington entertained

such a suit against a steam vessel of war, it appears by another report in 6 Notes of Cases, 365, 366, that the lords of the admiralty had "directed an appearance to be given for the steamer," the crown thereby submitting the matter to the jurisdiction of the court. See also *The Volcano*, 2 W. Rob. 337; S. C. 3 Notes of Cases, 210. And it may be presumed that similar authority was shown in the other reported cases of libels for salvage or collision against government vessels, in which no question of jurisdiction appears to have been made. A transport arrested under a warrant from the Irish court of admiralty in a cause of collision was released by that court upon its being shown that she was the property of the crown and employed in the public service. *The Resolute*, 33 Law Times, 80. In all such cases the party injured has been left to his remedy *in personam* against the wrongdoer, unless the government has seen fit to assume the responsibility. *Rogers v. Rajendro Dutt*, 13 Moore P. C. 236. *The Swallow*, 1 Swabey Adm. 30. *The Inflexible*, lb. 32.

In the district court of the United States for Maryland, Judge Winchester expressed the opinion that a ship carpenter could not libel a public ship of the United States; saying, "The adversary proceedings of a court of judicature can never be admitted against an independent government, or the public stock or property." In the same case it was adjudged that an innkeeper who, under a claim of lien for their keep, detained horses owned by individuals and employed in transporting the United States mail, was liable to an indictment for wilfully obstructing the mail. *United States v. Barney*, 3 Hall's Law Journal, 128. The decision of Mr. Justice Washington in *United States v. Hart*, Pet. C. C. 390, to which the petitioners referred as overruling that case, was simply that the driver of a mail carriage, driving through a populous city at such a rate or in such a manner as to endanger the safety of the inhabitants, was guilty of a breach of the peace at common law, and liable to be arrested by a constable of the city, without making the latter guilty of wilfully stopping the mail.

In *The St. Jago de Cuba*, 9 Wheat. 409, and *United States v. Wilder*, 3 Sumner, 308, the United States were not defendants

but plaintiffs, and therefore, upon the plainest principles of justice and the well settled rules of law, could not obtain the property in controversy without paying off the liens set up in defence. 2 Spence on Eq. 32, 33, 774. *Sewall v. Lee*, 9 Mass. 368. Their position resembled that of the crown in the English revenue cases above cited.

The case of *The St. Jago de Cuba* arose upon an information to enforce the forfeiture of a ship for violation of the acts of congress prohibiting the slave trade; and the point decided was that claims of seamen and material men for services performed and supplies furnished in good faith after the criminal act and before the filing of the information must be first paid out of the proceeds in the registry.

The case of *United States v. Wilder*, on which the petitioners much rely, was an action of trover, brought by the United States against the owners of a vessel, which had met with a disaster the subject of general average, to recover clothing on board belonging to the United States, without paying a contribution to the average. The clothing was not in the possession of the United States, and no suit in which the United States were a party defendant at law or equity, or claimant in admiralty, had been brought either *in personam* or *in rem*. "The sole question," as stated by Mr. Justice Story at the outset of his opinion, was, "whether there exists a right of lien for the general average due on the goods belonging to the United States, under the circumstances stated by the parties." And it was decided that the owners of the ship, whose duty it was to adjust the general average, were not bound, without receiving a contribution to the average loss, to surrender the clothing to the United States, and thus postpone the whole adjustment until after an opportunity to apply to congress. The learned judge, while avoiding as unnecessary the expression of any absolute opinion upon the point, admitted that "it may be true that no lien exists for repairs of a public ship, or for materials furnished therefor, or for wages due to the crew thereof, or for work and labor performed upon the arms, artillery, camp equipage, and other warlike equipments of the government," or "for salvage services

to public ships of our own government," and that in many other cases, some of which were alluded to in the opinion of Judge Winchester, above cited, "the inference against a lien might be equally cogent." His remark that "the very circumstance that no suit would lie against the United States in its sovereign capacity would seem to furnish the strongest ground why the remedy *in rem* should be held to exist," must be applied to the remedy *in rem* then before him, by detaining, not by process. And the other passages cited from his opinion were but *obiter dicta*.

The only decision favorable to the maintenance of these petitions, which has been cited, is that of Judge Willson of the district court of the United States for the northern district of Ohio, in *The Revenue Cutter No. 1*, 21 Law Reporter, 281. But no authorities were there referred to, except one of Mr. Justice Story's *dicta* in *United States v. Wilder*, and the distinction between title and remedy was not noticed. We cannot regard that case as of any weight in opposition to all the other authorities. It may be added that, as that was a libel to enforce a lien for building a ship not on tide waters, it would seem to have been a case of which, according to the recent decisions of the supreme court, the courts of the United States had no jurisdiction. *Roach v. Chapman*, 22 How. 132. *The St. Lawrence*, 1 Black, 531.

The cases in which a foreign sovereign or his public property has been held exempt from the jurisdiction of the judicial tribunals are worthy of notice in this connection.

In the leading case of *The Schooner Exchange*, it was held by the unanimous judgment of the supreme court of the United States, delivered by Chief Justice Marshall, that a public ship of war of a foreign sovereign at peace with this country, coming into its ports, was exempt from the jurisdiction of the courts of the United States, (although she had been the private property of an American citizen until confiscated by that sovereign in a foreign port within his control,) upon the ground that a ship of war is employed by her sovereign for national objects, which cannot be interfered with by a foreign state without affecting his independence and his dignity; that therefore the implied

license, under which she enters the port of a friendly power open for her reception, must be construed as containing an exemption from the jurisdiction of that power; and those general statutory provisions, descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual a right to reclaim his property in the courts of the country in which it is found, ought not to be so construed as to give them jurisdiction in a case in which the sovereign power has impliedly consented to waive its jurisdiction. 7 Cranch, 116, 144, 146. Sir William Scott, in a later case, hesitated to sustain a libel for salvage by English sailors against a Dutch ship of war; but the Dutch government submitted the case to his award, so that no formal judgment was given upon the question of jurisdiction. *The Prins Frederik*, 2 Dods. 484; S. C. cited in 17 Q. B. 212, 213.

Chief Justice Marshall assumed as an axiom of public law that "an independent foreign sovereign cannot be sued." *Osborn v. Bank of United States*, 9 Wheat. 870. 7 Cranch, 137. If indeed a foreign sovereign voluntarily comes into an English court as plaintiff in a suit, he stands with reference to that case like any other suitor, and may therefore be obliged at law to give security for costs, and in equity to answer on oath to a cross bill. *Emperor of Brazil v. Robinson*, 1 Nev. & P. 817; S. C. 8 Ad. & El. 801. *Hullet v. King of Spain*, 1 Dow & Clark, 174; S. C. 1 Clark & Fin. 333; 7 Bligh N. R. 359. But a foreign sovereign is not subject to suit in England for acts done in his sovereign capacity in his own country, even though himself a born subject of England and a peer of the realm, and having as such taken the oath of allegiance and sat in the house of lords since his accession to his own crown, and now resident in England. *Duke of Brunswick v. King of Hanover*, 6 Beav. 1; S. C. 2 H. L. Cas. 1. And the court of queen's bench has held that property of a foreign sovereign in England could not be taken upon a process of foreign attachment. *Wadsworth v. Queen of Spain*, and *De Haber v. Queen of Portugal*, 17 Q. B. 171.

The decision in *The Santissima Trinidad*, 7 Wheat. 283; S. C. 1 Brock. 478 that prize ships or goods, captured by a foreign



armed ship on a cruise for which she had been fitted out in a port of the United States in violation of our neutrality, might be restored at the suit of the owner in the courts of the United States sitting as courts of prize, was governed by the principles of international law, by which a capture made by a ship on a cruise originating in such a violation of neutral territory gives the captor, as against the neutral, no right to the property captured, and the prize courts of the neutral, as administering the law of nations, may restore the property, if found within their jurisdiction, to the party injured. Wheaton's International Law, pt. 4, c. 2, § 14; c. 3, §§ 11-13. Halleck's International Law, c. 22, §§ 22-24. 1 Phillimore's International Law, 371. 3 Ib. 452-456.

The exemption of a public ship of war of a foreign government from the jurisdiction of our courts depends rather upon its public than upon its military character. The implied consent to the admission of a public ship of a foreign government into our ports should be allowed no greater effect than the grant by the people of the United States in the Constitution to their own national government of the right to establish light-vessels for the conduct of war or the protection of commerce. And no reason can be suggested why a foreign government should have greater privileges from suit in the courts of this commonwealth than the supreme government of the country.

In every aspect in which we can look at these suits, in the light of principle or of authority, we cannot escape the conclusion that the state courts have no jurisdiction or right to entertain them, and our judgment must therefore be

*Petitions dismissed, without costs*

**LUTHAN POTTER & others vs JAMES S. HAZARD & wife.**

Commissioners appointed by the judge of probate to make partition of the real estate of a deceased person may, if they acted faithfully and impartially, recover full compensation for their services and expenses by an action against the petitioners for partition, although in making such partition they innocently departed from and acted in violation of the directions of the warrant under which they acted, and their report of their proceedings was not accepted and partition was not made, and their charges and expenses were not ascertained or allowed by the judge of probate.

In such action evidence that the commissioners acted under the advice of the defendants' counsel, the defendants being present on some occasions when such advice was given, is competent for the purpose of showing their fidelity and impartiality.

If proceedings for the partition of the estate of a deceased person have been lawfully commenced in the probate court, and that court has assumed jurisdiction and issued a warrant to commissioners to make partition, the shares or proportions of the respective parties not being in dispute nor appearing to be uncertain, that court may retain its jurisdiction, although subsequently the shares or proportions of the respective parties do appear to be uncertain.

CONTRACT brought by commissioners appointed by the judge of probate to make partition of the real estate of Otis Little, deceased, to recover the amount of their fees for services in making the partition, and of money paid for the assistance of surveyors.

At the trial in the superior court, before *Brigham, J.*, the following facts appeared: Otis Little died in 1839, leaving real and personal estate, and a will which contained the following provisions, of which a construction was given by this court in *Hazard v. Little*, 9 Allen, 260:

"I give to my wife Lucy Little the use and improvement of all my real and personal estate during the time or term she remains my widow, upon condition that she support and educate my minor children in such manner as I have heretofore supported and educated them, and, when my youngest child arrives at the age of twenty-one years, then two thirds of my real and personal estate to be equally divided among all my children, and in case of their decease to their children, meaning for them to have their deceased parents' share in my estate; the other third to be and remain for the support of my said widow."

"I give my said widow the privilege of cutting fifty cords of wood yearly, during the time she remains my widow, in addition

to firewood, to purchase necessities, pay taxes and other necessities for the family."

Little left a widow and eleven children, of whom the female defendant is one; and the defendants afterwards filed a petition for partition of the real estate, upon which a warrant was issued to the plaintiffs in May 1862 appointing them commissioners to make such partition, namely, one third to the widow and two thirty-third parts to each of the children. The report of the plaintiffs showed that, after setting off one third part of the real estate to the widow, they designated and set out a certain piece of woodland "to furnish her with the means of cutting and supplying herself with fifty cords of wood yearly, in addition to firewood, as provided in the will of Otis Little," and assigned and set off to her "all the title, interest and estate in said premises that are necessary for carrying into effect said privilege and the enjoyment thereof." The residue of the real estate was divided among the children. In May 1863 the judge of probate decreed that this report be not accepted and that partition be not made, "it being made to appear that the shares or proportions of some of the parties are uncertain, depending upon the construction or effect of a devise and upon other questions which seem proper for the consideration of a court of law."

Evidence was introduced on both sides as to the fairness and impartiality of the plaintiffs; and the plaintiffs were allowed under objection, to testify that in making the division they acted under the advice and direction of the counsel of the defendants in procuring the warrant for partition, the defendants being present on some of the occasions when such advice and direction were given.

The defendants requested the court to instruct the jury that the plaintiffs were not entitled to recover unless they had complied with the orders and directions of the warrant, and unless the charges and expenses had been previously ascertained and allowed by the probate court; that, if liable at all, the defendants were only liable for two thirty-third parts of the charges and expenses; that if by reason of the non-compliance of the commissioners with the orders and directions of the warrant

their services had turned out to be abortive and of no value to the defendants, then they were not entitled to recover; and that it was not competent for the judge of probate at that stage of the proceedings to pass the order made by him, but only to set aside the report, and commit it anew to the same or other commissioners. But the judge refused so to instruct the jury, and instructed them as follows: "The plaintiffs may, if they have faithfully and impartially performed their functions under the warrant directed to them by the probate court, (and upon this question their report is not conclusive, although it shows that their acts exceeded the acts directed by the warrant, as is claimed by the defendants,) recover for their services one dollar per day and four cents a mile for their travel out and home; and also may recover any expenses incurred by them for a survey of the premises which were to be the subject of their partition, if such a survey was necessary for an intelligent and impartial partition; and the plaintiffs may thus recover notwithstanding there was no judgment in the probate court upon their proceedings under said warrant that the partition made by them should be firm and effectual forever, and notwithstanding their charges and expenses were not before the bringing of this action ascertained and allowed by the probate court."

The jury returned a verdict for the plaintiffs accordingly, and the defendants alleged exceptions.

*E. Ames*, for the defendants. If there is no controversy in reference to the partition of the estate of a deceased person up to the time of the issuing of the warrant by the judge of probate for partition, he must decide controversies subsequently arising, and cannot dismiss the petition under Gen. Sts. c. 136, § 60. And on the coming in of the commissioners' report, he cannot go back and change or reverse his original decision that partition be made. In this case the directions of the warrant were plain; and there was no cause for the ultimate dismissal of the proceedings except that the commissioners had violated these directions. The instructions requested should have been given to the jury. By accepting the office and duties of commissioners, the plaintiffs by necessary implication promised to obey the

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directions of the warrant. This suit is evidence that they served under a promise to pay. But when a person, for payment, promises to do certain work according to plain and unmistakable directions, and does not comply with those directions, and thereby his service proves valueless, he cannot recover. If the plaintiffs had observed these directions their doings would have been confirmed, and the plaintiffs would only have had to pay two thirty-third parts of the expenses; but, by reason of their failing to observe the directions, the judge of probate could not confirm their report and order the costs to be paid by all the parties. It is a contradiction in terms to say that the plaintiffs acted faithfully, when they acted in direct violation of plain directions.

*T. M. Stetson*, for the plaintiffs.

COLT, J. The plaintiffs upon the petition of the defendants were appointed by the probate court commissioners to make partition of the real estate of which Otis Little died seized, among his devisees. In this early stage of the proceedings the court assumed jurisdiction, undoubtedly regarding it as a case in which the shares or proportions of the parties interested were not in dispute or uncertain, and issued a warrant setting forth the names of the parties and the fractional portion to be assigned to each.

It is found that the plaintiffs as commissioners employed a surveyor whose services were necessary for the intelligent and impartial partition of the estate, and that they acted faithfully and impartially in the discharge of their duties, and made return of their doings. But their report did not follow the warrant, and made partition in a mode not authorized by and in direct violation of its requirements. The plaintiffs now seek to recover for their services and for the expenses incurred by them.

It would seem that after the warrant was issued and put into the hands of the commissioners doubts arose as to the construction of the will under which the parties interested claimed title to the premises, and that the plaintiffs, taking the advice of the counsel of the defendants, made partition as reported. Upon the presentation of the report in court for confirmation, the judge, regarding the questions raised as proper for the consideration

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of a court of law, entered a decree in the case in which, after reciting that it had been made to appear to him that the shares or proportions of some of the parties were uncertain, depending upon the construction or effect of a devise, he decreed that the "report be not accepted and that partition be not made."

By Gen. Sts. c. 136, § 60, it is provided that no partition shall be made by the probate court when the shares are in dispute or "appear to the judge to be uncertain;" and the final decree in this case was founded on this provision, as its recital shows. And though it would seem that the probate court, having once necessarily passed on the question of jurisdiction in issuing the warrant, could not at a subsequent stage of the case revise its adjudication; Gen. Sts. c. 136, § 70; yet, as no appeal was taken, the effect of the decree was to render void and useless all the proceedings to that time had upon the defendants' petition.

By § 74 of the same chapter it is provided that in all cases of partition the court may for any sufficient reason set aside the return of the commissioners, and commit the case anew to the same or other commissioners; affording in all cases an opportunity to parties interested to obtain a correction of informalities or substantial errors in the return. If the proceedings in this case had not been abruptly terminated by the decree dismissing the whole matter, the defendants under this provision might have obtained from the plaintiffs a correction of their return, and made it useful and available; but no effort in this direction was made, and all parties seem quietly to have acquiesced in the decree.

The principal objection made by the defendants to the right of the plaintiffs to recover, and upon which they asked the instruction of the court, was, "that by reason of the non-compliance of the commissioners with the directions of the warrant, their services turned out to be abortive and of no value to the defendants." If the facts were as claimed by the defendants, we should hesitate to decide that the plaintiffs were entitled to no compensation for services faithfully and impartially rendered at the defendants' request. We are referred to no decision directly or

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by analogy sustaining this position. In the practice of all the courts it is found necessary, in order that the rights of parties may be understood and intelligently passed upon, to call in aid the services of those who act under the authority of the court in the capacity of commissioners, auditors, referees, and the like, and proceed to investigate and determine important and often complicated matters, without the immediate supervision of the court, and whose doings can only be controlled and corrected when return thereof is made for confirmation. To hold all this class of officers entitled to no compensation for their services because, though faithful and impartial, they have not complied with the terms of the commission, warrant, rule or other authority under which they acted, would be to cause a forfeiture of such services rendered at the request of others for errors and misconstructions, to which in cases of difficulty in matters of this description all men would be innocently liable.

But it is not necessary as this case presents itself to come to any such decision, for although the return of the commissioners appears to be fatally defective, yet the failure of the proceedings is attributable to the final decree dismissing the whole for want of jurisdiction, rather than to the error of the plaintiffs.

The services of the plaintiffs would have been of no value to the defendants, if there had been no error in their proceedings. The decree of the court made them useless. The facts therefore do not sustain the defendants in asking the instructions requested on this point.

The defendants further contended that the plaintiffs were not entitled to recover unless their charges and expenses had been previously allowed by the court under § 59 of the same chapter, which provides that they shall be ascertained and allowed by the court, and paid by the parties interested in proportion to their shares or interests in the premises. But we think it plain that this provision does not affect the claim of commissioners upon the parties employing them for compensation. It is a provision for the benefit of petitioners who have paid for these services, and who are entitled to contribution from all the other parties in interest. The commissioners cannot be compelled to

take their pay in fractions from the several parties. It is provided in the same section that execution may be issued against any party who fails to pay his share. Such execution can issue only in the name of a party to the proceedings who has advanced these expenses, and not in the name of the commissioners, who are in no sense parties in court, and have no right to a hearing. In the practice of our courts, referees, auditors, commissioners and others performing similar services are paid by the party employing them upon the completion and usually before the return of their doings into court; the party making such payment looking for reimbursement to those who on the termination of the suit or other proceeding may be held liable to pay.

The defendants asked the court to rule that they were liable for only two thirty-third parts of these charges and expenses. This would have been the extent of their ultimate liability if the proceedings had been carried to completion, and the other parties had contributed according to the provisions of the statute. But the fact is overlooked that this is an action of contract by the plaintiffs to recover of those by whom they were employed for services rendered at their request. Contribution from the other parties as above suggested could only be obtained by the defendants after payment and allowance by the court, and, if necessary, execution issued in their favor against those who failed to pay.

The testimony of the plaintiffs that they acted under the advice and direction of the defendants' counsel, the defendants being present on some of the occasions when such advice and direction were given, was competent upon the question of the fidelity and impartiality of the plaintiffs' conduct.

There was no error, therefore, in the refusal to give the instructions asked; and it follows that the instructions given which authorized the jury to find a verdict for the statute compensation for such services and the expenses incurred for survey were correct.

*Exceptions overruled.*



**ARIADNE B. MERCIER vs. SALLY CHACE.**

An estate of homestead is not necessarily limited to that portion of a dwelling-house which is occupied by the family of the owner; but it may exist and be continued in the whole of a house, some rooms of which are let to tenants.

An assignment of dower in a part of a dwelling-house will not prevent a widow from claiming an estate of homestead in the residue of it.

**WRIT OF ENTRY.** After the former decision in this case, reported in 9 Allen, 242, the parties agreed in the superior court upon the following facts: .

The tenant admits the right of the demandant to recover, subject to the tenant's claim of homestead; and the only question is, whether the tenant has an estate of homestead. The tenant is the widow of Allen Chace, who at the time *St. 1855, c. 238*, was passed, and until his death in December 1856, lived upon the premises with her and their child, occupying the land and a part of the dwelling-house, and letting the rest of the house to a tenant. After his death, a part of the same portion of the dwelling-house which had been occupied by her and her husband, with a small parcel of land, was assigned to her as her dower. The present action is brought to recover that portion of the premises which was not assigned to the tenant as her dower.

Since the death of her husband the tenant and her child have not personally occupied any portion of the demanded premises, except one chamber for seven months after his death; but, with this exception, that portion of the dwelling-house and of the land which were not assigned to her as her dower have been occupied by a tenant. The demanded premises exceed eight hundred dollars in value. No assignment of a homestead has been made to the tenant.

On these facts judgment was rendered for the demandant, subject to the tenant's right of homestead; and the demandant appealed to this court.

*C. I. Reed, (J. E. Sanford with him,)* for the demandant.

*J. C. Blaisdell,* for the tenant.

**DEWEY, J.** The first inquiry here is, had Allen Chace, the

husband, a homestead estate that might survive to his widow and children ?

That he had to some extent is conceded. But it is insisted on the part of the demandant that all that portion of the dwelling-house which was at the time when *St.* 1855, c. 238, took effect, and for a long period afterwards, occupied by another person as a tenant, paying rent to said Allen Chace, is to be excluded from the homestead estate that would pass to his widow. The dwelling-house now claimed as a homestead was the home and residence of Allen Chace and his family, but the house was not exclusively occupied by him. We understand this tenement to be a single building, designed as a dwelling-house, and not a part of a block constructed with a view to furnish several dwelling-houses. The fact that certain rooms in a single building adapted to one family were rented for an annual rent paid to the owner, would not exclude that part from being a portion of the homestead, and as such after the death of the husband it might pass to his widow, to be used and enjoyed as a homestead, the whole homestead estate to be enjoyed by her, under the statute, in no event exceeding \$800.

The second inquiry is, whether this right has been continued in the widow. It is said that she has personally occupied only a portion of it, and permitted others to occupy the residue, rent having been received by her for such occupation for the whole term since the death of her husband except the first nine months. There does not seem to have been any voluntary relinquishment of the claim of the widow to her succession to the entire homestead estate of her husband. The fact of permitting another family to occupy a portion of it in a manner more beneficial to her and in a mode contributing more to aid in her support should not defeat her right of homestead. The position that the statute in continuing to the widow the homestead of her late husband had only the purpose of giving her a home, and that it was not available to her as a source of income, is very much weakened by the provisions of *Gen. Sts. c. 104, § 14*, which seem to recognize such convertibility into a rent or income from its use by others as a proper use of the homestead

by the widow; and in that view directly authorize her to make sale of her interest in such homestead, giving the purchaser the right to enjoy and possess the premises for the full term that the widow might have held the same.

The assignment of dower to the widow by the heirs at law does not defeat her right to a homestead estate to the value of \$800 in addition to the dower, if so much estate remains to which the character of a homestead right attaches.

As already stated, the homestead estate may be taken to include an entire dwelling-house, although a portion of the same is occupied by a third person paying rent therefor to the owner. Sally Chace is therefore entitled to hold to her use, as succeeding to the homestead estate of her husband, her homestead right in addition to her dower, and to take the same in the demanded premises.

Judgment for the demandant, subject to the tenant's right of homestead.

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#### ANNA M. HOOD vs. JAMES M. HOOD.

A divorce obtained in Illinois by a citizen thereof from his wife, for the cause of desertion, upon notice to her by publication in a newspaper in the manner prescribed by the statutes of that state, is valid, although she was then living in Massachusetts under an agreement by which, after reciting their separation, he promised to pay her a certain weekly sum as long as she should remain single, and although she had no actual notice of his proceedings for a divorce and was not in Illinois during the pendency thereof; and it is not competent for her, in a libel for divorce brought by her in this commonwealth, to offer evidence that he obtained the decree of divorce there by fraud, and upon facts which would not entitle him to a divorce here.

LIBEL for divorce, setting forth that the parties were married in Rhode Island in 1838; that after about two years they lived together in Somerset in this commonwealth; that she has always been faithful to her marriage obligations, but that he on the 1st of June 1860 and since has committed adultery with Sarah A. Bottsford; that in March 1860 he went to the state of Illinois, as she is now informed, with the fraudulent intention of there procuring without her knowledge a divorce from her for

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causes for which no divorce could be granted here; and that she is informed that he did there procure such divorce and married said Sarah A. Bottsford, though she never had notice of the pendency of any such proceedings there, and no cause existed for which a divorce could be obtained by him under the statutes of Illinois or Massachusetts.

The answer set forth, that after the marriage of the parties they removed, in 1855, to Illinois, where they lived and cohabited together until February 1859, when she deserted him and has ever since continued such desertion; that he became a citizen of Illinois; that at May term 1861 of the circuit court for Kane County, Illinois, he obtained a decree of divorce from her; and denied that he had committed adultery as alleged, or that he went to Illinois in March 1860 with the particular intention of there procuring, without her knowledge, a divorce from her as alleged in the libel.

At the hearing, before *Metcalf, J.*, the following facts appeared: The parties were married and lived together at Somerset as alleged, and about the year 1855 removed to Illinois and there lived together until February 1859, when the libellant, under circumstances as to which there was no evidence, came back to Somerset and there lived with a brother-in-law of the respondent until about April 1860. During this time the respondent was also there and lived at his brother-in-law's for three weeks or more in February and March 1860, and while there executed the following agreement: "Somerset, March 3d 1860. I hereby agree and pledge myself to pay to Anna M. Hood the sum of three dollars per week so long as she shall remain single, we having separated, and this sum being allowed for her separate maintenance, she to have the sole privilege of enjoying her own property as she shall see proper, I agreeing to pay punctually the above three dollars per week at the end of every four weeks. J. M. Hood." The libellant then moved to Fall River, and prior to April 1861 received some money from the respondent, with which she paid her board. The respondent obtained a decree of divorce in Illinois in May 1861 for the cause of desertion, and thereafter married Sarah A. Bottsford

and has since cohabited with her; and in June 1861 he sent to the libellant a letter informing her that he had obtained the divorce. The libellant has resided in Massachusetts since February 1859.

Upon these facts, the case was reserved for the determination of the whole court.

*C. I. Reed*, for the libellant. 1. The divorce in Illinois was obtained by a gross fraud upon the libellant and upon the court. There was no desertion and the respondent knew it; and he either testified falsely himself, or procured other persons to do so. *Jones v. Jones*, 13 Alab. 145. *Lea v. Lea*, 8 Allen, 418. He left Massachusetts with the fraudulent intention of procuring a divorce. This is charged, and the answer does not deny it, but by implication admits it. It was by his connivance and by his fraud that she was here. As between him and her, her domicil was here. A divorce, so obtained by fraud in another state, without service upon her, and she not appearing or being within the jurisdiction, should be held void here. 2 Bish. Mar. & Div. §§ 760-762, and cases cited. Story Conf. L. § 597. *Carley v. Carley*, 7 Gray, 545. *Greene v. Greene*, 2 Gray, 361. *Rogers v. Rogers*, 15 B. Monr. (Ky.) 364. *Barber v. Barber*, 21 How. 582. *Boyd's Appeal*, 38 Penn. State R. 241. *Andrews v. Montgomery*, 19 Johns, 164. The libellant has no other redress. The time has expired within which she could resort to the courts of Illinois. She has been guilty of no laches. But she need not go there to get a fraudulent decree set aside. She may treat it as a nullity. 2. The court of Illinois had no jurisdiction. Her domicil for such purposes was in Massachusetts after March 3d 1860. Her husband left her here, agreeing to support her, and went away with the fraudulent intention of procuring a divorce. Under these circumstances, that decree is not conclusive, but may be inquired into. Gen. Sts. c. 107, § 55. Story Conf. L. § 230 d. and cases cited. *Harteau v. Harteau*, 14 Pick. 181. *Lyon v. Lyon*, 2 Gray, 367. 3. The husband left Massachusetts with the fraudulent intention of procuring a divorce for a cause which would not authorize a divorce here. Gen. Sts. c. 107, § 54.

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Hood v. Hood.

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*J. Brown & C. A. Reed*, for the respondent. 1. The respondent's domicile was in Illinois; and his domicile was here. 2 Bish. Mar. & Div. §§ 124-129, and cases cited. The court of Illinois, therefore, had jurisdiction. *Ib.* §§ 135, 155-170, and cases cited. No fraud can be claimed as to that jurisdiction; and if there was no fraud as to jurisdiction, the decree is valid and conclusive everywhere. *Burlen v. Shannon*, 3 Gray, 387. *Greene v. Greene*, 2 Gray, 364. 2 Bish. Mar. & Div. §§ 132-142. There is no proof of fraud in obtaining the decree. The second marriage of the respondent was valid under the laws of Illinois, and therefore is valid everywhere. 1 Bish. Mar. & Div. §§ 355-390, and cases cited. Story Conf. L. §§ 79, 81, 113, 121-124.

HOAR, J. The decision upon this libel depends upon the validity of the divorce obtained by the respondent in the state of Illinois. And that depends upon the decision of the question, whether the court by which the decree of divorce was made had jurisdiction of the cause and the parties.

It appears from the report that the parties removed from Massachusetts to Illinois in 1855, and lived there together as husband and wife until February 1859, "when the libellant, under circumstances as to which there was no evidence," returned to Massachusetts, and remained in this commonwealth up to the time of filing her libel. The respondent continued to be a citizen of the State of Illinois, and the domicile of the husband was in law the domicile of the wife. *Greene v. Greene*, 11 Pick. 410. *Harteau v. Harteau*, 14 Pick. 181. *Barber v. Barber*, 21 How. 582. No fact appears which would show that the wife had changed her domicile in Illinois, or had any capacity to change it, when he filed his libel against her. The mere fact of her residence in this commonwealth, separate from her husband, whether with or without his consent, has no tendency to establish such a change of domicile; and there is no proof that the husband had done any act entitling the wife to a divorce, so as to affect her domicile even for the purpose of obtaining a divorce from him.

When the respondent filed his libel in Illinois, therefore, both

parties had their domicile in that state, and were subject to the jurisdiction of the court in which the libel was filed. The notice given to the respondent in that suit was such as the laws of Illinois authorized in the case of an absent defendant; and such as by the laws of this commonwealth is made valid and sufficient in like cases. The decree of a court having jurisdiction of the cause and the parties is conclusive upon them.

But this libellant now alleges that the decree for divorce in Illinois was procured by fraud; and the evidence reported has some tendency to show that the separation was by his consent, and so was not the desertion upon which his libel was founded. But the fact of desertion was conclusively settled between these parties by the judgment in Illinois; and it is not now competent for the libellant to offer evidence to contradict that judgment. *Greene v. Greene*, 2 Gray, 361.

The provision of our statute, that "when an inhabitant of this state goes into another state or country to obtain a divorce for any cause occurring here, and whilst the parties resided here, or for any cause which would not authorize a divorce by the laws of this state, a divorce so obtained shall be of no force or effect in this state," (Gen. Sts. c. 107, § 54; Rev. Sts. c. 76, § 39,) has no application to the case before us, because, when the respondent first went to Illinois, there is no evidence that he had any intention of procuring a divorce; and when he returned to Illinois in 1860, he was not an inhabitant of Massachusetts. "In all other cases, a divorce decreed in any other state or country according to the laws thereof, by a court having jurisdiction of the cause and both the parties, shall be valid and effectual in this state." Gen. Sts. c. 107, § 55.

The divorce which the respondent obtained in Illinois is therefore a bar to the maintenance of this libel.

*Libel dismissed.*

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Hughes v. Wamsutta Mills.

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## JOHN HUGHES vs. WAMSUTTA MILLS.

An arrest, conviction and imprisonment for crime will exonerate a workman from the duty of giving to his employers two weeks' notice before leaving their service, under a contract by the terms of which he has agreed to give such notice, or not claim any wages due.

CONTRACT brought to recover for work done by the plaintiff for the defendants.

At the trial in the superior court, before *Morton, J.*, the defendants admitted that work was done by the plaintiff for them to the amount alleged, but proved that he was to give two weeks' notice before leaving, or not claim any wages due; that he gave no notice at all before leaving, but was arrested by an officer on a warrant for adultery, tried and convicted, and was now in jail under sentence; and that the injury to the defendants from the want of notice was more than the amount claimed for his work. These facts were not contested, and the judge instructed the jury to find for the plaintiff, which they did, and the case was reported for the determination of this court.

*T. M. Stetson*, for the defendants, cited *Fuller v. Brown*, 11 Met. 440; *Noon v. Salisbury Mills*, 3 Allen, 340; *Bee Printing Co. v. Hichborn*, 4 Allen, 63; *Smith v. Treat*, Daveis, 273.

*L. T. Willcox*, for the plaintiff.

BIGLOW, C. J. The question at issue between the parties to this suit depends entirely on the construction of the contract under which the plaintiff was employed. This, we think, is misapprehended by the counsel for the defendants. The interpretation which he seeks to put on the stipulation that the plaintiff was to receive no wages if he left the defendants' service without giving two weeks' previous notice of his intention so to do, is inconsistent with the terms of the stipulation, and too narrow to be a fair or reasonable exposition of the intention of the parties. The stipulation clearly had reference only to a voluntary abandonment of the defendants' employment, and not one caused *vi majore*, whether by the visitation of God or other controlling circumstances. Clearly the abandonment must have



been such that the plaintiff could have foreseen it; he could give notice only of such departure as he could anticipate, and the stipulation that he was to have the privilege of leaving after giving two weeks' notice without forfeiting his wages implied that the forfeiture was to take place only when it would be within his power to give the requisite notice. It certainly cannot be contended that the stipulation was absolute; that he was to receive no wages in case of leaving without notice, whatever may have been the cause of his abandonment of the service. It is settled that absence from sickness or other visitation of God would not work a forfeiture of wages under such a contract. *Fuller v. Brown*, 11 Met. 440. *Pari ratione*, any abandonment caused by unforeseen circumstances or events, and which at the time of their occurrence the person employed could not control or prevent from operating to terminate his employment, ought not to operate to cause a forfeiture of wages.

It may be said that in the case at bar the commission of the offence for which the plaintiff was arrested was his voluntary act, and that the consequences which followed after it and led to his compulsory departure from the defendants' service are therefore to be regarded as bringing this case within the category of a voluntary abandonment of his employment. But the difficulty with this argument is, that it confounds remote with proximate causes. The same argument might be used in case of inability to continue in service occasioned by sickness or severe bodily injury. It might be shown in such a case that some voluntary act of imprudence or carelessness led directly to the physical consequences which disabled a party from continuing his service under a contract. The true and reasonable rule of interpretation to be applied to such contracts is this. To work a forfeiture of wages, the abandonment of the employer's service must be the direct, voluntary act, or the natural and necessary consequence of some voluntary act of the person employed, or the result of some act committed by him with a design to terminate the contract or employment, or render its further prosecution impossible. But a forfeiture of wages is not incurred where the abandonment is immediately caused by acts

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or occurrences not foreseen or anticipated, over which the person employed had no control, and the natural and necessary consequence of which was not to cause the termination of the employment of a party under a contract for services or labor.

It results from these views that the plaintiff has not forfeited his wages by any breach of his contract, and that he is entitled to recover the full amount due to him for services, without any deduction for damages alleged to have been suffered by the defendants in consequence of his sudden departure from their employment.

*Judgment on the verdict.*

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**ZENAS L. ADAMS vs. INHABITANTS OF NANTUCKET.**

If on a question of domicile instructions were given to the jury in the form of general propositions, which, when taken together, correctly express the law of the case and contain all necessary explanations and qualifications, a new trial will not be granted for the reason that a single passage, taken abstractly, may have been erroneous.

CONTRACT brought to recover back money paid by the plaintiff for a tax for the year 1864 illegally assessed upon him by the defendants.

At the trial in the superior court, before *Brigham, J.*, the only question was upon the plaintiff's domicile on the 1st of May 1864. It appeared that he had formerly for some years lived in Nantucket, and on the 25th of April 1864 left there and went to Barnstable, where he remained for several months, until finally he went to New Bedford, where he had purchased a house before leaving Nantucket. The defendants contended that he continued to have his domicile in Nantucket until he acquired one in New Bedford, and the plaintiff contended that on the 1st of May he had a domicile in Barnstable; and there was evidence upon both sides.

The defendants requested the court to instruct the jury that if, when the plaintiff left Nantucket, his intention was to remove to New Bedford, and he never abandoned the intention of going to New Bedford to reside, and he went to Barnstable on a visit, or only to serve the temporary purpose of having a place

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of abode until the house he purchased in New Bedford was ready for occupancy, and was pursuing his business in New Bedford during all the time his family was living in Barnstable, and he had no business in Barnstable, then he had no domicile in Barnstable, and the defendants would be entitled to recover in this action; and that if, when he left Nantucket, it was his intention to remove to New Bedford, which intention was never abandoned, his temporary abode with his family in Barnstable would not have the effect to control the intention; and that the jury must be satisfied that the intention of the plaintiff on the first day of May 1864 was to have his home in Barnstable, and it is immaterial what intention he had after that time as affecting the question of his domicile for taxation in 1864.

The judge declined to give these instructions in this form, but directed the jury as follows, in respect to the matter of domicile: "that a person must have a domicile somewhere, and never loses one domicile until he acquires another; that a domicile of any person is the place where he resides, regarding the place at the time as his home; that a domicile is acquired by a residence in any place which is regarded by the resident as his home; that a domicile is lost or abandoned when a resident there leaves the place of his domicile with an intent not to return and reside there again. The intent and the act must concur, either in abandoning or acquiring a domicile; an intention to remove without the act of removal is not an abandonment of domicile, and an intention to reside without the act of residence is not the acquisition of a domicile; that for the interval which necessarily elapses between the time of a person's leaving a place of his domicile with an intention not to return, and the time when he resides in another place with the intention to make it his home, the law provides that the abandoned domicile attaches to him during his transition from one domicile to another. But wherever for a definite or an indefinite time a person resides, regarding it as his home, as distinguished from a place of temporary residence or visit, there he acquires a domicile, although he has left an old domicile with an intention ultimately to acquire a domicile in some other third place."

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

G. Marston, (*A. Macy* with him,) for the defendants. The first prayer for instructions was according to the decisions of this court. *Otis v. Boston*, 12 Cush. 50. *Worcester v. Wilbraham*, 13 Gray, 590, and cases cited. *Sears v. Boston*, 1 Met. 252. *Jennison v. Hapgood*, 10 Pick. 98. *Putnam v. Johnson*, 10 Mass. 501. The second and third prayers should also have been complied with. The instructions given were too general and indefinite. The statement that a man's domicile is where he resides, regarding the place as his home, was defective, because there was no instruction as to what constitutes a home. The statement that a domicile is lost when a resident leaves the place of his domicile with an intent not to return and reside there again was imperfect. The statement that residence for a definite time will effect a change of domicile was erroneous. *Jennison v. Hapgood*, 10 Pick. 98.

O. Prescott, for the plaintiff, cited *Mead v. Boxborough*, 11 Cush. 362, and cases cited.

COLT, J. The instructions in this case, though consisting of general propositions, were so framed that in the course of them all necessary qualifications and explanations were given. No exception lies to the arrangement of the sentences in the directions given to the jury. We cannot presume that the jury did not understand or failed to apply all parts of the judge's charge to the facts found by them. One part of the instructions given to a jury on any point is to be taken and construed in connection with other parts; and if the instructions as a whole are not erroneous a party cannot succeed in his exceptions thereto, although a single passage taken abstractly may be erroneous. *Jackman v. Bowker*, 4 Met. 235. *Mead v. Boxborough*, 11 Cush. 362. Whether upon the facts the jury were justified in finding a verdict for the plaintiff is not for our consideration.

*Exceptions overruled*

JOHN D. WILSON *vs.* DAVID TERRY.

After proof of a man's declaration of his intention to leave a town, evidence is competent, upon the question of his domicil, to show that he was not there except occasionally and for short visits afterwards.

A new trial will not be granted merely because the instructions to the jury were expressed in an abstract form, if the law was stated correctly and it does not appear probable that the jury were misled.

CONTRACT brought by the collector of Freetown to recover taxes assessed in that town upon Job Terry, the defendant's testator, for the year 1861.

At the second trial in the superior court, before *Brigham, J.*, after the decision reported in 9 Allen, 214, the only question in issue was whether Job Terry had his domicil in Freetown on the 1st of May 1861. The plaintiff introduced evidence tending to prove that Job Terry had his domicil in Little Compton, Rhode Island, from 1855 to March 1860; that he spent the summer of 1860 in travelling, and in the autumn came to Freetown, where he resided upon an estate occupied by his son, the defendant, till February 1861. Amongst other evidence, the plaintiff offered a written statement of Henry M. Tompkins, town clerk of Little Compton, which it was agreed should be taken as if given in the form of a deposition, that before leaving Little Compton Job Terry informed the town officers that he should no longer make that his residence; and that he had no recollection of seeing Job Terry more than twice in Little Compton after the 20th of March 1860, and at each time of his coming he stayed in the town (as Tompkins thought) less than a week. The defendant objected to this statement, except so far as it contained statements of Job Terry; but the judge admitted it.

The defendant offered evidence tending to prove that the residence of Job Terry continued in Little Compton, and that he often claimed that to be his residence during the time he was in Freetown; and asked the court to rule that the intention to abandon a domicil, and actual residence at another place, if not accompanied with the intention of remaining there permanently

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*Wilson v. Terry.*

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or at least for an indefinite time, would not produce a change of domicil.

The judge declined so to rule, and instructed the jury as follows:

“One may be said to have a domicil in that place which constitutes the principal seat of his residence, of his business pursuits, connections, attachments, and of his political and municipal relations. Domicil in any place is acquired by residence there of a person with the intent to regard and make that place his home. Domicil in any place is abandoned by removal by a person from a place of residence with an intention not to return there or make there his home. Both in acquiring and abandoning a domicil the act and intent must concur. A person always has a domicil in some place; and therefore a domicil once fixed continues and attaches to a person until another domicil is acquired and substituted for it, although as to such domicil there has been a concurrence of the act and intent of abandonment. The acts and intents of persons, in the matter of their domicil, may be inferred from their declarations and conduct.”

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

*J. C. Blaisdell*, for the defendant.

*C. I. Reed*, for the plaintiff.

COLT, J. The whole statement of Henry M. Tompkins appears on examination to contain no testimony which was inadmissible, although at a former trial it seems to have been assumed that only the evidence of the declarations of Terry therein contained was competent. *Wilson v. Terry*, 9 Allen, 214.

The instructions given by the court correctly stated the law of domicil, as applicable to the facts of the case, and embraced in a different form the instructions asked for by the defendant. It is true that these instructions were given in general propositions, but it does not appear that the judge did not make proper reference to the evidence applicable to them, or that the jury failed to appreciate them and apply them to the case.

*Exceptions overruled.*

## JOHN DAVOL, JR. vs. GEORGE W. QUIMBY.

An agent's authority to collect money for his principal is not revoked by the mere appointment of another agent with like authority; and a payment by the debtor to the first agent, after receiving notice of the appointment of the second, will discharge the debt, if there is no other evidence of a revocation of the first agent's authority.

**CONTRACT**, to recover wages. The defence was payment to the plaintiff's agent; whose agency was denied by the plaintiff.

At the trial in the superior court, before *Wilkinson, J.*, it appeared that the plaintiff ordered one Keach to collect the debt of the defendant, and, after paying to one Howe a sum due to him from the plaintiff, to remit the balance to the plaintiff. A creditor of Keach, ascertaining that the latter had demanded the money of the defendant, and supposing it to be his own debt, commenced a trustee process against Keach, summoning the defendant as trustee. The plaintiff then authorized Howe to settle the trustee process "the best way he could," receive the money due from the defendant, apply so much thereof as was necessary in payment of the sum due from the plaintiff to Howe, and pay the balance to the plaintiff. Afterwards the defendant received notice from an attorney at law, demanding the money for and on account of the plaintiff. After this, the defendant paid the money to Howe. The plaintiff did not notify Howe of any withdrawal of his authority.

The plaintiff's counsel requested the court to instruct the jury that if the defendant had notice to pay the attorney of the plaintiff, he could not be justified in paying the money to Howe after such notice from the plaintiff, and if he did so he did it at his own risk, and did not discharge himself from liability to the plaintiff. The judge refused so to rule, and the jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

*W. C. Greene*, for the plaintiff.

*W. H. Fox*, for the defendant.

**BIGELOW, C. J.** The instruction asked for by the defendant was rightly refused. It appeared distinctly from the evidence that the plaintiff authorized Howe to receive the money from

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*Ladd & another v. Rogers.*

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the defendant; but it was not shown that this authority was subsequently revoked. The mere fact that the plaintiff also authorized another person to receive the same money did not prove a revocation. There may be two persons appointed to exercise the same power as agents for a principal. If there is nothing in the nature of the agency to render an authority in one person inconsistent with a like authority in another, both may well be authorized, and the acts of either or both, within the scope of the agency, will be valid and binding on the principal. So it was in the case at bar. The defendant paid to one agent of whose authority he had had notice. This authority was not revoked by the notice given to the defendant that the plaintiff had also appointed another agent with similar authority. There was no other evidence of revocation.

*Exceptions overruled.*

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WARREN LADD & another *vs.* ISAAC ROGERS.

An action of contract cannot be maintained for the price of a horse sold on the Lord's day, although the purchaser keeps him afterwards; but the remedy is by an action of tort in the nature of trover.

CONTRACT. The declaration was upon an account annexed, which contained a charge of fifty dollars for a horse. The answer set up, amongst other things, that the sale of the horse to the defendant was made in violation of the statutes for the observance of the Lord's day.

At the trial in the superior court, before *Brigham, J.*, one of the plaintiffs testified that on or about the 4th of February 1864 he sold the horse to the defendant for fifty dollars, to be called for and delivered within one week; that the defendant failed to call for him within that time, and the plaintiff therefore told his servant not to let the defendant have him; that on Sunday, the 14th of February, the defendant called upon the plaintiff, made an explanation why he had not called for the horse, and after some talk the horse was taken by the defendant.



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The defendant asked the court to rule that if the sale and delivery were upon Sunday the plaintiffs could not recover upon the account annexed. The judge declined so to rule, and instructed the jury that if upon the testimony they found that the sale was made on Sunday it would be void, and the plaintiffs could not recover upon such contract; but nevertheless if the defendant afterwards kept the horse and treated him as his own, without returning him to the plaintiffs, the law would imply a promise on the part of the defendant to pay them the fair value of the horse at the time he was taken, and that the plaintiffs could recover the same in this action.

The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions.

*E. L. Barney*, for the defendant. It is plain that the sale on Sunday was an illegal act, and that the court will not lend its aid to carry out an illegal transaction. The instructions of the judge authorized the plaintiffs to recover the value of the horse on the day of the illegal sale. The remedy, if any, should be by an action in the nature of trover. If the instructions were correct, every grocer, tailor and hatter may keep his shop open on Sunday, and sell his goods, and maintain an action to recover their value on that day, provided the purchaser eats, wears or uses them on Monday. This cannot be.

*J. C. Stone & W. W. Crapo*, for the plaintiffs. Though the defendant might have avoided the performance of his contract on the ground that it was made on Sunday, yet his possession of the property was under color of a sale, even though the negotiation did not legally amount to a sale, and from his subsequent keeping and appropriation of the property the law will imply a contract and promise to pay the fair value. *Hill v. Perrott*, 3 Taunt. 274. If the defendant chose to avail himself of his right to avoid the contract on this ground, he should have returned the horse. His failure to do so, and the subsequent appropriation of him, created a new implied contract and promise.

HOAR, J. The presiding justice in the superior court instructed the jury correctly, that if they found the sale of th

horse was made on Sunday it would be void, and the plaintiffs could not recover upon such a contract. The sale, in that case, was a transaction of secular business on the Lord's day, not a work of necessity, charity or mercy, and was prohibited by law. Being an illegal and void act, not merely at the election or for the protection of either party, but upon grounds of public policy, it had no validity whatever; and as was held in *Day v. McAlister*, 15 Gray, , was wholly nugatory, passed no property, gave no rights, and was incapable of any subsequent ratification.

Giving no effect, therefore, to the sale, the defendant was found in possession of the horse, which was the plaintiffs' property, under no contract which the law can recognize, express or implied. The court ruled that "if the defendant afterwards kept the horse and treated him as his own, without returning him to the plaintiffs, the law would imply a promise on the part of the defendant to pay them the fair value of the horse at the time he was taken, and that the plaintiffs could recover the same in this action," which is an action upon an account annexed for goods sold and delivered.

We are of opinion that this instruction was erroneous, and that the exception to it is well taken.

The possession of the horse by the defendant, although obtained by an act which was a violation of law, was not a wrong to the plaintiffs, who were in *pari delicto*. It was obtained, as they undertook to prove, with their full consent. The subsequent use of the horse was without title, and the question involved is therefore simply this: whether if one without right makes use of a chattel belonging to another, the law will imply from this fact a contract of sale? In other words, can a party entitled to an action of trover waive the tort, and sue in assumpsit?

The only authority cited in favor of the proposition is *Hill v. Perrott*, 3 Taunt. 274. That case decided that the mere possession of goods which had been the plaintiff's property, unaccounted for, raised an implied promise to pay for them. But there are many respectable authorities which involve the same

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principle; and some *dicta* in English and American cases and text writers which seem to support the rule as one of general application. Mr. Greenleaf, in his treatise on evidence, states it thus: "If one commit a tort on the goods of another, by which he gains a pecuniary benefit, as if he wrongfully takes the goods and sells them, or otherwise applies them to his own use, the owner may waive the tort, and charge him in assumpsit on the common counts, as for goods sold or money received, which he will not be permitted to gainsay." 2 Greenl. Ev. § 108. In New Hampshire, the same rule was adopted in *Hill v. Davis*, 3 N. H. 384.

But upon a full review of the authorities by Strong, J., in the court of common pleas, which is cited in a note to the opinion, it was held by this court in *Jones v. Hoar*, 5 Pick. 285, that one whose goods have been taken from him or detained unlawfully, cannot waive the tort and maintain assumpsit for goods sold, except against the executor of the wrongdoer; but that if the goods have been sold by the person who took them he may affirm the sale, and have an action of money had and received for the proceeds. The doctrine of that case has been reaffirmed and adhered to in subsequent cases. *Allen v. Ford*, 19 Pick. 217. *Brown v. Holbrook*, 4 Gray, 102. *Berkshire Glass Co. v. Wolcott*, 2 Allen, 227.

We think these cases applicable to the case at bar. The use of the horse by the defendant in pursuance of the illegal contract made on Sunday would give the plaintiff no right of action whatever. This was decided in *Gregg v. Wyman*, 4 Cush. 322. If the defendant subsequently converted him to his own use, the plaintiff must adopt the form of action suited to such an injury.

*Exceptions sustained.*

**NATHAN S. HOARD vs. CHARLES J. H. BASSETT & others.**

An assignee of an insolvent debtor may keep accounts and memoranda of his doings as assignee in blank leaves of books of account belonging to the estate; and after settling his final account and distributing all the estate that has come to his hands, in pursuance of the order of court, may retain his receipts, vouchers and memoranda for his account, and may cut out such blank leaves, before delivering the books of account to his successor.

**BILL IN EQUITY** to compel the executors of the assignee of an insolvent debtor and their counsel to deliver to the new assignee of the same insolvent debtor certain books of account, documents and vouchers relating to the insolvent estate. The case was reserved by *Hoar*, J., upon the bill and answers, for the determination of the whole court. The case sufficiently appears in the opinion.

*C. A. Reed*, for the plaintiff.

*C. I. Reed*, for the defendants.

**GRAY, J.** By setting down this case for hearing upon the bill and answers, the plaintiff has admitted the truth of the facts stated in the answers. The only questions in issue therefore are, whether the assignee of an insolvent debtor may keep his own accounts and memoranda of his doings as such in blank leaves of account books belonging to the estate, instead of purchasing new books for the purpose at the expense of the estate; and whether after he has settled his final account in the court of insolvency, and distributed, according to the orders of that court, all the estate which has come into his hands, and a new assignee has been appointed, the first assignee may retain his own receipts, vouchers and memoranda for his account, and may cut the leaves containing his own memoranda out of the account books of the estate, before delivering them to his successor. That he may is too plain to be discussed or doubted.

*Bill dismissed, with costs.*

## NANCY M. TRACY vs. JULIA KEITH.

In an action upon a promissory note given by a married woman, while living with her husband, the burden of proof is upon the plaintiff to show such facts as will make her liable thereon.

CONTRACT brought by the executrix of the will of Asaph Tracy upon two promissory notes in the usual form, signed by the defendant, and payable to the plaintiff's testator or order. The answer admitted the making of the notes, but averred that the defendant was then a married woman living with her husband, and that the notes were given without consideration to her, and not for the benefit of her separate estate or for her own benefit or in respect to any separate trade, business, labor or services of her own.

At the trial in the superior court, before *Wilkinson*, J., the plaintiff put in the two notes, and rested; and the defendant put in proof that she was a married woman living with her husband, and rested; and the judge thereupon ordered a verdict for the defendant, which was returned accordingly; and the plaintiff alleged exceptions.

*C. I. Reed*, for the plaintiff. The general rule is plain, that a negotiable promissory note is presumed to be founded on a valid consideration. The note of a married woman, under our statutes, should come under the same rule. She may acquire and dispose of real and personal property in all respects like a man, except that she may not acquire it from her husband. All the incidents of these rights should accompany the rights. A married woman may also engage in any trade or business. The incidents of this right should accompany it. She may contract debts, agree to pay them, and give notes; and it is the true policy of the law of Massachusetts to protect her in her contracts, and not protect her against them. The legislature have intended to enable her to exercise the powers given to her with the same facility with which a man can do the same things. The construction here contended for is most beneficial to married women. See *Commonwealth v. Cooley*, 10 Pick. 37;

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*Lakin v. Lakin*, 2 Allen, 47; *Stewart v. Jenkins*, 6 Allen, 302; *Basford v. Pearson*, 7 Allen, 504.

A. W. Boardman, for the defendant.

HOAR, J. The question which these exceptions present is, whether an action can be maintained against a married woman upon a promissory note made by her, which recites that it is for value received, without any further proof to support it. And we can have no doubt that it cannot.

The principle is simply this: By the common law, a married woman is generally incapable of making a valid contract. The recent statutes of the Commonwealth have given her a special, limited power of binding herself by her contracts, under certain circumstances. Unless these circumstances are shown to exist she has no contracting power. The plea of coverture, generally, is therefore a sufficient defence to an action of contract against her, and it is not necessary for her to negative in pleading or proof all possible exceptions.

As a rule of pleading, this appears to be supported by the precedents, and conforms to the rule in analogous cases. To an action on the contract the defendant pleads coverture, and the replication states the facts which bring the defendant within the exception. Or if the coverture is pleaded in abatement to a suit by a married woman, the replication should state the facts which enable her to sue alone. Chit. Pl. (6th Amer. ed.) 484-488, 551. So in a suit against an infant, if infancy is pleaded, the replication may aver that the promise was for necessaries suitable to his estate and degree.

The point seems to have been directly decided in this commonwealth. In *Gregory v. Pierce*, 4 Met. 478, the question was whether a husband who had left the Commonwealth had so utterly deserted his wife and renounced his marital rights as to enable her to contract as a *feme sole*; and the court say, "The general rule being that a married woman cannot make a contract or be sued, the burden of proof is upon the plaintiff to show that she is within the exception." And in *Commonwealth v. Williams*, 7 Gray, 337, it was held that the presumption of fact that personal property in the possession of a married woman

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is the property of her husband, is not changed by the statute enabling married women to hold such property in their own right, and to trade on their own account; and that the party, whose case requires him to prove property in the wife, must rebut such presumption, and show the facts which bring it within the statute, as a case in which the statute declares it to be the separate property of the wife.

*Exceptions overruled.*

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**PETER G. MUNRO vs. THE PRESIDENT, DIRECTORS AND COMPANY OF THE MERCHANTS' BANK & others.**

A bill of sale of an undivided share of a vessel, absolute in form, to one who is named therein simply as trustee, without expressing the nature of the trust, but with an oral understanding that it is given as security for debts due and to become due from the vendor to a third party, with authority in the trustee, in case of default in the payment of any of said debts, to sell the share and apply the proceeds towards the payment thereof, rendering the surplus, if any, to the vendor, leaves no equity of redemption in the vendor. And if, on the return of the vessel from a whaling voyage on which she was engaged at the time of the execution of the bill of sale, a proportionate share of her catchings is set apart and afterwards sold for the trustee and *cestui que trust*, and the proceeds accounted for and afterwards applied so far as necessary by mutual agreement to pay for a proportionate share of the outfits for a new voyage, this is sufficient to show an agreement that a share of the catchings of the new voyage shall be held on the same trust with the share of the vessel, and the same may accordingly be sold by the trustee in the execution of his trust.

**BILL IN EQUITY**, brought by the administrator of the estate of Rogers L. Barstow; late of Mattapoisett, deceased, against the President, Directors and Company of the Merchants' Bank and others, to redeem a share of the whaling bark Clara Bell, and obtain an account of her catchings.

The following facts appeared by the bill and answers and an agreement of the parties :

On the 13th of October 1857 Barstow, being then the owner of one quarter part of the whaling bark Clara Bell, which was then at sea on a whaling voyage, and being then and until his death her managing owner and agent, executed the following bill of sale :

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"To all to whom these presents shall come, greeting: Know ye that I, Rogers L. Barstow of Mattapoisett, in the county of Plymouth and state of Massachusetts, owner of the bark or vessel called the Clara Bell, now at sea on a whaling voyage, of the burthen of two hundred and ninety-five tons, or thereabouts, for and in consideration of the sum of seven thousand dollars, lawful money of the United States of America, to me in hand paid before the sealing and delivery of these presents by James B. Congdon, trustee, of New Bedford, county of Bristol and state aforesaid, the receipt whereof I do hereby acknowledge and am therewith fully satisfied, contented and paid, have bargained and sold, and by these presents do bargain and sell unto the said James B. Congdon, his executors, administrators and assigns, seven thirty-seconds of the said bark or vessel, together with seven thirty-seconds the masts, bowsprit, sails, boats, anchors, cables and all other necessities thereunto belonging; as she sailed on her present voyage, the certificate of the registry of which said bark or vessel is as follows, to wit:" [Here followed a copy of the certificate, and full covenants of warranty by Barstow to Congdon, but with no mention of any *cestui que trust* or description of the nature of the trust. The bill of sale was under seal.]

The Clara Bell returned from her voyage on the 4th of May 1858, and sailed upon a new voyage on the 24th of the following June, from which she returned with large catchings on the 9th of November 1864. Barstow died in July 1860, and the plaintiff was duly appointed administrator of his estate. On the 19th of January 1861, Congdon, after a prohibition from the plaintiff, sold to Abner H. Davis the seven thirty-seconds of the bark with her outfits and catchings, as she then was at sea, by public auction, for the sum of \$5906.25. The auction was well attended, and Davis paid a fair price. He had been notified by the plaintiff that any title under the sale would be contested, but honestly believed that a good title could be made to him, in spite of the plaintiff's notice.

Francis H. Barstow, a clerk of Rogers L. Barstow from 1841 till his death in 1860 testified in behalf of the plaintiff that he



kept the books of the latter, and that all the accounts were kept as if the latter owned seven thirty-seconds of the Clara Bell that that proportion of the profits of the first voyage was credited to him and received by him, and that proportion of the out-fits of both voyages was entered as paid by him; that he fitted her for her last voyage, and paid the bills from his general funds and that no accounts were kept of any particular fund, or with the Merchants' Bank or Congdon. On cross-examination he testified that he had no personal knowledge of the transactions of Rogers L. Barstow with the Merchants' Bank, or of the conveyance to Congdon, and kept the accounts of the Clara Bell precisely as if said Barstow had a perfect title to all the interest with which he was credited.

Charles R. Tucker, president of the Merchants' Bank, testified in behalf of the defendants that in August or September 1857 Rogers L. Barstow called on him and said that it would be necessary for him to have increased accommodation at the bank, and desired to make an arrangement by conveying a part of two whaling vessels; that he was and should be owing sundry parties who would be willing to take his notes if they could get them discounted whenever they wanted the money, and he desired to place in the hands of the bank an amount which would be sufficient at all times to cover his liabilities to the bank, either as payer or indorser; that he said he would convey seven thirty-seconds of the Clara Bell, and one quarter or more of another vessel, both of which were then at sea, whaling; that, in reply to a question how the property was to be disposed of in case of default, he said, "Sell it the next day;" and that he conveyed to Congdon, the cashier, the respective portions of the vessels named, in trust. The witness further testified that no paper or document was given to Barstow, showing his interest in the vessels; that notes bearing Barstow's name were afterwards discounted at the bank, in pursuance of the above arrangement; that on the arrival home of the Clara Bell in 1858 the part of the cargo belonging to the bank was designated by the mark "M. B." in paint on the casks, and delivered to the witness; that Barstow also delivered to him an account

of the casks and the guages, and the witness went with Barstow and compared them and found them correct; that at this time, as nearly as the witness could remember, Barstow asked if he should sell this part of the cargo if he had an opportunity, to which the witness replied that he would see when the opportunity occurred; that afterwards an opportunity to sell occurred, and the witness told Barstow to sell, and this was accordingly done, and an account of the sale rendered to the witness for the bank; that when this account was rendered the vessel was on the eve of sailing on another voyage, and the witness requested Barstow to use the funds in paying a proportionate part of the outfits; that at about this time Barstow's liabilities to the bank were very much reduced, and the witness did not remember asking him, or his offering, to pay over the balance to the bank; that the security then held by the bank was in his judgment ample to meet Barstow's liabilities, without the payment of that balance; and that in January 1861 the amount of his liabilities to the bank was \$5598.17.

The testimony of Congdon and of the teller of the bank was also taken, but is immaterial to be recited here.

The case was reserved by *Hoar, J.*, for the determination of the whole court.

*T. D. Eliot & T. M. Stetson*, for the plaintiff. Barstow managed and controlled this vessel always. The transfer of a share of her in 1858 did not embrace her outfits or catchings. No possession was taken under this transfer, nor was Barstow ever in default to the bank during his life. In 1858 an additional pledge of oil was made to the bank, and with this Congdon had nothing to do. Barstow then equipped the vessel for a new voyage, paid all the bills, and was sending her to sea without interference from the bank or Congdon. Wishing to sell his oil, including that in which the bank was collaterally interested, he negotiated, informed Tucker, who assented, and then he sold the oil and received the money. Tucker requested him to use the proceeds in paying a proportionate share of the outfits. But the outfits were already on board, and had been paid for from Barstow's general funds. Tucker's request, therefore, was simply

a release to Barstow of his lien on the proceeds of that oil. The surplus was never mentioned by either party. The vessel sailed again, with Barstow as owner in possession, management and control. No property of Barstow's became absolutely the bank's by these transactions.

The bank never became interested in the catchings of the last voyage. These catchings were not in existence at the time of the transactions; they were in the nature of freight, and freight belongs to those who earn it. See *Langton v. Horton*, 5 Beav. 9; *Hoskins v. Pickersgill*, Marsh. Ins. (4th ed.) 568; *Philips v. Ledley*, 1 Wash. C. C. 226; *Webb v. Peirce*, 1 Curtis C. C. 104; *Blanchard v. Fearing*, 4 Allen, 118; *Howard v. Odell*, 1 Allen, 85; *Manter v. Holmes*, 10 Met. 402; *Milton v. Mosher*, 7 Met. 248. The question is, who was the whaling merchant who engaged in the whaling business and employed this property? for his are the catchings. 3 Kent Com. (6th ed.) 138.

Even if the bank had the title, the sale was illegal and void. The title had not been conveyed by the bill of sale. The oil, therefore, was only pledged. The sale of pledges is regulated by statute. Gen. Sts. c. 151, § 9.

The sale of the ship was unlawful. The language of Barstow, to "sell the next day," must be understood reasonably. The mode of extinguishing an equity of redemption must be just and reasonable. *Wilson v. Little*, 2 Comst. 443. 2 Kent Com. 583. This agreement was unreasonable. It is harsh to sell such property, under such circumstances, at all. There is no mode of ascertaining the value.

*J. C. Stone*, (*W. W. Crapo* with him,) for the defendants. The conveyance from Barstow to Congdon was a trust, and the performance of its terms could have been enforced in equity *Cooper v. Whitney*, 3 Hill, 95. *Baker v. Thrasher*, 4 Denio, 495. It was not the intention of the parties to make a mortgage. If it had been, the conveyance would have been made directly to the bank. This form was adopted with reference to the earnings of the vessel, and to avoid all questions as to the right to the earnings of subsequent voyages. See *Lindsay v. Gibbs*, 22 Beav. 528. And the setting apart of a share of the catchings is conclusive on

this point. And it is of little practical importance whether the conveyance was a deed of trust or a mortgage. The outfits and catchings would be included in either. See *Milton v. Mosher*, 7 Met. 248; *Moody v. Wright*, 13 Met. 17; *Mitchell v. Winslow*, 2 Story R. 630. Catchings of whale-ships are not such after acquired property as most of the reported cases relate to; but rather the increase or proceeds of property already possessed, and incident to it. See *Rowley v. Rice*, 11 Met. 336; *Moody v. Wright*, 13 Met. 17; *Chesley v. Josselyn*, 7 Gray, 490.

BIGELOW, C. J. The bill in this case seems to have been framed and the argument in behalf of the plaintiff has proceeded on an entire misapprehension of the nature of the transaction between the plaintiff's intestate and the Merchants' Bank, in relation to the conveyance of the title of the former to a certain portion of the bark *Clara Bell*. It is obvious on the face of the transaction that it was not the intention of the parties that a mortgage interest or title should be created in the vendee under the bill of sale of the vessel. This, we think, is manifest on an inspection of the document, without resorting to parol evidence. Not only is the conveyance absolute in form, but it is made to a third person. An essential feature of a mortgage or pledge of personal estate is, that the title or possession is vested in or held by the person to whom the debt is due which the property is intended to secure. If the intention of the parties had been to attach to the conveyance of the vessel the incidents of a mortgage, the bill of sale would have been made directly to the bank, the creditor of the intestate. The bank was competent to take a conveyance in mortgage as security for debts due from the intestate, and, as such a mode of transfer is among the common and ordinary transactions of business, the inference is very strong that the parties adopted another form of security *ex industria*.

What the real nature of the transaction was, is indicated in part by the bill of sale. It is made to Congdon, who at the time was cashier of the bank, in his individual capacity, as trustee." This shows that the vendee held it on some trust or confidence, and not for his own use and benefit; but neither the

nature of the trust nor the name of the person or corporation who were to be entitled to the beneficial interest in the property is set forth in the instrument. These appear, however, satisfactorily from the parol evidence; especially from the testimony of Mr. Tucker, the president of the bank, which stands wholly uncontradicted. The substance of his statement is, that the plaintiff's intestate made the bill of sale to Congdon in trust, to be held by him as security for any debts which might be due to the bank from the intestate, either as promisor or indorser, with power and authority, in case of any default in the payment of any debt which might become due to the bank from him, to sell the vessel without any delay. In this state of the evidence we are unable to see any plausible ground on which the plaintiff can assert or maintain the rights of a mortgagor or pledger in his intestate, as to the share of the vessel which was included in the bill of sale.

But it is urged in his behalf that, although he may not be entitled to redeem the vessel, he is nevertheless warranted in requiring an account from the defendants of the share or proportion of the outfits of the vessel which was conveyed and held in trust, and of the catchings of the voyage on which the vessel sailed, and in the pursuit of which she was engaged at the time of the death of his intestate. If this part of the plaintiff's claims was to be determined entirely by the bill of sale executed by his intestate and the parol agreement originally entered into by which the trust was created between him and the vendee, it would be open to serious question whether the outfits and catchings were comprehended within the terms of the trust. But there is other evidence in the case, which has an important and decisive bearing on the rights of the parties to this portion of the property in controversy. It appears from the evidence that, after the arrival of the bark from the voyage on which she was bound when the bill of sale was executed, the proportion or part of the catchings of the voyage which belonged to the share of the vessel which had been transferred to a trustee as security for the debts due from the intestate to the bank was set apart and marked by him as being also appropriated as additional security

for the same debts, and that an account of the casks and of the guages thereof was delivered to the bank; that these catchings were afterwards sold with the assent of the bank and the trustee; and that the proceeds of these sales, after being accounted for by the intestate to the bank, were by express agreement used to pay the proportionate part of the outfits for a new voyage of that part of the bark which was held in trust. Taking this new agreement in connection with the previous transfer of the vessel, we think the inference is unavoidable that the parties intended that the intestate's proportion of the catchings which replaced the original outfits should be held on the same trust as that which had been agreed upon in regard to his share of the vessel, and when these were subsequently reinvested by the assent of both parties in the outfits of a new voyage to be again replaced by catchings, they were still held subject to the trust, so that on the arrival of the vessel in the home port from the second voyage the catchings passed into the hands of the ship's husband as agent for the trustee, and thence into the hands of the defendants, to be applied towards the payment of the debts due from the intestate to the bank.

The result of this view of the transactions between the parties is, that the plaintiff cannot maintain his bill for a redemption of the intestate's share of the vessel, nor for an account of the proceeds of the catchings, on the ground that they did not vest in the trustee and had been wrongfully applied by him and the bank in payment of the debts due to the latter. The transfer of the vessel and the catchings was made on a trust in the nature of a mortgage. The transaction was analogous to that class of conveyances of real estate where deeds are made to secure debts, but, instead of being to the creditors, third persons are named as grantees, who take the estate on a trust, declared and set forth in the deed, and which, by accepting, they become bound to execute and fulfil. Such a conveyance, it has been held, does not vest a mortgage title or interest in the grantee, nor does it leave in the grantor an equity of redemption in the sense in which that phrase is understood as applied to mortgages. It has been determined that if a deed is made on a trust to pay a

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debt, to be executed by a third person and not the creditor, it is a conveyance on a pure trust. In regard to grants of this nature the tendency of courts is to hold that no title remains in the grantor which can be taken on execution, and that the trustee may pass an absolute title to a grantee on complying with the terms of the trust, without any right in the grantor to redeem the same. The nature of these conveyances and their legal incidents are well stated in 1 Washburn on Real Prop. 502, where the authorities are fully collected. If this is the doctrine applicable to conveyances of real estate in trust to pay debts, *a fortiori* it is applicable to similar conveyances of personal property.

It appears in the case at bar that the vessel and catchings were disposed of by a sale, and the proceeds applied in strict conformity to the trust on which they were held, after due notice to the plaintiff. There is, therefore, no ground for maintaining his bill. The plaintiff has a complete and adequate remedy at law to recover the balance of money belonging to the estate of his intestate, which the bank, as agent of the trustee, has offered and has always been ready to pay to the plaintiff.

*Bill dismissed.*

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### MARY C. SWAN vs. CHARLES A. SNOW.\*

If a policy of insurance on the life of a married man is made payable to his wife, and she dies before him, leaving children, the administrator of her estate, upon receiving the amount of the policy after the death of the husband, will hold it, under the statutes of Massachusetts, if no other trustee is appointed, for the benefit of the children; and the administrator of the husband's estate has no interest therein.

APPEAL from the decree of the judge of probate dismissing the petition of the administrator *de bonis non* of the estate of Horace E. Swan for a decree of distribution of the estate of Lydia W. S. Swan. The facts are stated in the opinion.

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\* This case was argued in Boston in March 1866.

*I. H. Wright*, for the appellant.

*T. Weston, Jr.*, for the appellee.

GRAY, J. On the 11th of October 1851 the Union Mutual Life Insurance Company, incorporated by a statute of the State of Maine of 1848, delivered at Fall River in this commonwealth to Lydia W. S. Swan, the first wife of Horace E. Swan, a policy of insurance for \$2000 on his life, in consideration of the sum of \$52.80 to them paid by her, and of a premium of like amount to be paid annually during the continuance of the policy, and therein promised to pay the sum insured to her, her executors, administrators or assigns, within ninety days after due notice and proof of his death. She died in 1857, leaving her husband and two minor children by him. These children still survive. The husband paid the subsequent annual premiums during his life, married a second wife in 1861, and died in 1863, leaving no other children. The amount of the policy was afterwards paid by the insurance company to the administrator of the estate of the first wife, and is the only property in his hands for distribution. The second wife, having been appointed administrator of the husband's estate, presented a petition to the probate court in this county, praying for a decree of distribution of that amount. The petition was dismissed by the judge of probate, and she appealed to this court.

By the ninth section of the charter granted to this insurance company by the legislature of the State of Maine "the said company may issue policies of insurance upon the life of any person, expressed to be for the benefit of any married woman, widow, minor or minors, and the same shall enure to the sole use and benefit of such person or persons so expressed as aforesaid, independently of the one whose life may be thus insured, as well as of his or her creditors, and of the creditors of such married woman, widow, minor or minors;" with a proviso which does not affect this case.

By the Massachusetts *St.* of 1844, *c.* 82, § 1, which was in force when this policy was made, "any policy of insurance made by any insurance company on the life of any person, expressed to be for the benefit of a married woman, whether the same be



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effected by herself or her husband, or by any other person on her behalf, shall enure to her separate use and benefit, and that of her children, if any, independently of her husband and of his creditors and representatives, and also independently of any other person effecting the same in her behalf, his creditors and representatives," and a trustee may be appointed to hold and manage her interest in the policy. This provision has been substantially reenacted in the later statutes. *Sts.* 1854, c. 453, § 28; 1856, c. 252, § 42. *Gen. Sts.* c. 58, § 62.

This statement of the facts of the case, and of the provisions of the statutes, disposes of this appeal. The policy in question was effected by and issued to the first wife, and expressed on its face to be for her sole and separate use and benefit. It was not payable until after the husband's death. The payment of premiums by him after her death did not make it his property. No special trustee having been appointed to hold and manage her interest in the policy, it vested from the time of her death in the administrator of her estate, for the benefit of her children. Neither by the terms of the policy itself, nor by the charter from the legislature of Maine, nor by the statutes of this commonwealth, can the husband or the administratrix of his estate claim any property in the policy. *Decree affirmed.*

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**JAMES A. BROWN vs. LYDIA R. BRIGHTMAN.**

In an action against an administrator to recover for money paid by the plaintiff as agent of the defendant's intestate, the plaintiff is not, under *St.* 1885, c. 207, a competent witness in his own favor.

CONTRACT against the administratrix of the estate of David B. Brightman, to recover for money paid by the plaintiff for the defendant, as his agent and for his benefit.

At the trial in the superior court, before *Brigham*, J., there was evidence to show that on the 20th of April 1861 an agent of the intestate wrote a letter from Cardenas to the plaintiff, who lived

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at Savannah, Georgia, informing him that the defendant would immediately sail from there for Savannah and would come to the plaintiff with the cargo and draw on him for any balance he might want. The plaintiff then offered to testify to the payment by him of a fine of \$440 imposed upon him by the authorities of the so-called Confederate States at Savannah in consequence of his having sent information which induced the defendant's intestate not to enter that port; and that this information was beneficial to said intestate.

The judge ruled that the plaintiff was not a competent witness, and directed the jury to find for the plaintiff for another item of the plaintiff's claim, not including the sum paid for said fine; and such verdict was returned accordingly. The plaintiff alleged exceptions.

*J. C. Blaisdell*, for the plaintiff.

*J. M. Morton, Jr.*, (*J. S. Brayton* with him,) for the defendant.

HOAR, J. The provision in Gen. Sts. c. 131, § 14, that parties to a cause may be witnesses, is qualified by the exception that "where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party shall not be admitted to testify in his own favor; and where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify, except as to such acts and contracts as have been done or made since the probate of the will, or the appointment of the administrator." The St. of 1865, c. 207, § 1, contains the farther provision that "whenever the contract or cause of action in issue and on trial was made or transacted with an agent, the death or insanity of his principal shall not prevent any party to the suit or proceeding from being a witness in the case: provided, such agent shall be living and competent to testify."

The object and purpose of these exceptions obviously are, to put the two parties to a suit upon terms of substantial equality, in regard to the opportunity of giving testimony. In general, when parties have contracted with each other, each may be

supposed to have an equal knowledge of the transaction; and both, if living and of sound mind, are allowed to testify. But if one is precluded from testifying by death or insanity, the other is not entitled to the undue advantage of being a witness in his own case. Where, however, a party has contracted through an agent, if the agent is living, the death of the principal does not deprive his personal representative of the testimony of the one most fully acquainted with the facts of the case; and the other party may without injustice be admitted as a witness. Indeed, if he were not, the injustice might be the other way.

The *St.* of 1865 must therefore be construed as if, instead of saying "shall not prevent any party to the suit or proceeding," it had said, "shall not prevent any party to the suit or proceeding who made the contract with the agent." It could not, we think, have been intended to have any application to the case of a suit by an agent against the representatives of his principal.

In the case at bar, an agent sues the administratrix of his principal upon the implied contract of indemnity for acts done in the principal's service. One party to the contract is dead, and the other cannot be a witness. The exception in *St.* 1865 is not applicable.

The testimony of the plaintiff being excluded, there was nothing to support that part of his case upon which he offered to testify. We should by no means intend to intimate that, if the testimony were competent, it would establish any claim against the defendant. But the decision of the question of evidence renders the discussion of other questions unnecessary.

*Exceptions overruled.*

## WILLIAM MORSE vs. CALVIN MARSHALL.

A deed of a water privilege, having a lower and an upper dam, "also all the land which I the said grantor own that said first mentioned dam flows, (reserving all the wood except what stands on said dam,) together with the right to flow all the land that said dam as it now stands will flow; also all the land which the second mentioned dam flows, (reserving the wood,) together with the right to flow all the land that said dam as it now stands will flow," conveys the land which the dam would flow if in use, although at the date of the deed the dam was not in use, and the water flowed within the banks of the stream and through the waste way, as freely as if no dam had been there.

TORT in the nature of trespass *quare clausum fregit*. At the trial in the superior court, before *Wilkinson, J.*, the jury returned a verdict for the defendant, under directions so to do; and the plaintiff alleged exceptions. The case is stated in the opinion.

*E. Ames*, for the plaintiff.

*E. H. Bennett*, for the defendant.

GRAY, J. The plaintiff claims title under a deed made in 1833, by Calvin Marshall, (who then owned the premises and the adjoining land on both sides,) with the usual covenants of warranty, of a water privilege in Easton, having two dams, one about eight rods below the other: "Also all the land which I, the said Calvin Marshall, own that said first mentioned dam flows, (reserving all the wood except what stands on said dam,) together with the right to flow all the land that said dam as it now stands will flow; also all the land which the second mentioned dam flows, (reserving the wood,) together with the right to flow all the land that said dam as it now stands will flow, also the right to dig, make and use a watercourse immediately from the upper dam to the lower dam, to be finished four feet wide across my land." The plaintiff introduced evidence, which there was nothing to contradict, tending to show that when this deed was delivered no water was held or set back by either dam, but the brook flowed in its natural channel, which was three or four feet wide; and that a quantity of wood had grown up on the land formerly covered by the upper pond, and had been cut off by the defendant since making this deed. Wood has since grown up there again, and been cut by the defendant; and

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this action is brought against him for trespassing on this land and cutting down the wood.

The only question presented to us by the bill of exceptions is whether this deed conveyed "the land covered by the water raised by the upper dam to the height at which the dam stood at the date of the deed," or only a right to flow that land. And it seems to us very clear that it conveyed the land as well as the right to flow. The reservation of the wood to the grantor shows that the land on which the wood stood was intended to be granted. If only the right to flow had been granted, no such reservation would have been necessary, for the wood would have remained, together with the fee of the land, in the grantor. The wood did not grow in the bed of the brook, but upon the land on each side, which had been flowed when the mill pond was full. The grant of "all the land which the dam flows" is to be measured by the land flowed by the dam when in use, not limited to the land over which the brook ran when the dam flowed no land at all. The additional grant of "the right to flow all the land that said dam as it now stands will flow" is not by this construction rendered inoperative; it still gives the right to flow to the utmost limit of that land, notwithstanding any incidental injury caused by the water to adjoining lands of the grantor. There is nothing inconsistent with this view in the further grant of the right to make a watercourse from the upper dam to the lower; for the shortest way from the one dam to the other is across land the title in which, upon any construction, remained in the grantor.

*Exceptions sustained.*

JOHN MCPARTLAND *vs.* ELIJAH R. READ & another.

If mortgaged personal property is delivered to and kept by an agent of the mortgagee, this is equivalent to a delivery to and possession by the mortgagee himself.

A tortious taking of chattels with intent to apply them to the use of the taker or some other person than the owner is a conversion.

One who is present at a tortious taking of chattels, directing and assisting therein, is liable for a conversion, although he acted as agent for a third person.

TORT to recover for the conversion of certain articles of household furniture.

At the trial in the superior court, before *Putnam, J.*, it appeared that, on the 9th of December 1863 Samuel B. Cook executed and delivered a mortgage of the articles in controversy to the plaintiff, and to avoid the necessity of recording the mortgage it was proposed by Cook to put the furniture in one room of the house in which he lived, and lock the door, and deliver the key to William D. Whiting, who owned the house, that he might keep possession of the mortgaged property till Cook should pay to the plaintiff the debt secured by the mortgage. This being assented to was accordingly done; and Cook shortly afterwards moved from the house, and the key of the house was also delivered to Whiting. After this had been done, and before the mortgage had been recorded, the furniture was attached by the defendant Read, who was a deputy sheriff, on a writ against Cook, and was subsequently sold by him on the execution which was obtained in the suit. The other defendant, Foque, acted as the agent of the attaching creditor, in directing and assisting in the attachment. The plaintiff made a due demand on Read for the amount due to him and secured by his mortgage.

Whiting was called as a witness, and testified that Cook wished to put the furniture into his hands in order that the mortgage need not be recorded; that he was to keep it for the plaintiff till Cook paid the debt, and in case Cook paid the debt then the furniture was to be redelivered to him. Read testified that Foque went with him and pointed out the property to him and directed him to attach it, which he did.

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McPartland v. Read & another.

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The defendant requested the court to instruct the jury that upon the facts and testimony the plaintiff was not entitled to recover, and that there was no such delivery of the goods to the plaintiff and retention of them by him as would entitle him to recover; and that there was no sufficient evidence that Foque took the property and converted it to his own use.

The judge declined so to rule, and instructed the jury that if Whiting took and retained the possession at Cook's request as the plaintiff's agent for the plaintiff's sole benefit, it was sufficient; but if he acted as bailee simply, or as agent of both parties, and was not to deliver the goods to the plaintiff except upon some contingency, then he was not the plaintiff's sole agent, and there was no sufficient delivery and retaining of possession and that if Foque went with Read, as agent of the attaching creditor, and pointed out the property and directed Read to attach it, and Read attached it at Foque's request and in his presence, Foque would be jointly liable with Read.

The jury returned a verdict for the plaintiff, against both defendants; and they alleged exceptions.

*J. Brown*, for the defendants, cited *Hewett v. Swift*, 3 Allen, 424; *Johnson v. Couillard*, 4 Allen, 446; *Woodbury v. Long* 8 Pick. 543; *Muggridge v. Eveleth*, 9 Met. 233; *Fairbank v. Phelps*, 22 Pick. 535; Gen. Sts. c. 151, § 1; c. 123, §§ 62, 63.

*C. I. Reed*, for the plaintiff.

BIGELOW, C. J. These exceptions are groundless. 1. The evidence of delivery of the chattels included in the mortgage, and of the retention of possession of them by the mortgagee, was plenary. Delivery to and possession by an agent are the same in legal effect as if made to and held by the principal. The agency was clearly proved.

2. So was the evidence of the conversion of the property. Every tortious taking with intent to apply chattels to the use of the taker or some other person than the owner is a conversion.

3. Both defendants were liable. It was not necessary in order to charge them to show that each actually participated in seizing and removing the property. It was sufficient to prove that both

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Commonwealth v. Lincoln.

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were present, one inciting or directing the wrongful taking, and the other obeying the order and carrying it into effect. Both were principals in the conversion. *Exceptions overruled.*

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## COMMONWEALTH vs. JACOB N. LINCOLN.

A person who obtains money upon a mortgage of personal property which he falsely represents that he owns may be convicted of obtaining money by false pretences, under Gen. Sts. c. 161, § 54.

An indictment for obtaining money by false pretences may be sustained which simply alleges the obtaining of "forty-six dollars of the money of" the person defrauded, without setting forth that it was in coin, or bank bills, or United States treasury notes.

An indictment which alleges, in proper form, that the defendant falsely represented that he owned certain personal property, with intent to obtain a loan of certain money from another, and that he offered to mortgage the same as security for the money, and that such other person, believing the representations to be true, by reason thereof lent the money to the defendant, in consideration of the mortgage, sufficiently shows that the money was lent by reason of the false pretences; and the averment that it was in consideration of the mortgage is not inconsistent therewith.

INDICTMENT for obtaining money by false pretences. The material parts of the indictment were as follows :

"The jurors for the said commonwealth on their oath present, that Jacob N. Lincoln of, &c., on, &c., at, &c., unlawfully, knowingly and fraudulently designing and intending, by the false pretences hereinafter named and set forth, to injure and defraud one Matilda K. Shepard, feloniously, unlawfully, knowingly and designedly did falsely pretend to said Matilda K. Shepard that a certain covered wagon which he the said Jacob N. Lincoln then and there had in his possession was then and there the property of him the said Jacob N. Lincoln, and was then and there owned by him the said Jacob N. Lincoln, with intent then and there thereby to obtain from said Matilda K. Shepard the sum of forty-six dollars, of the money and property of her the said Matilda K. Shepard, which she then and there had in her possession, upon a mortgage and pledge of said covered wagon to be then and there made by said Jacob N. Lincoln to said Matilda K. Shepard, and which said Jacob N. Lincoln then and



there proposed and offered to make and give to said Matilda K. Shepard as security for the said sum of forty-six dollars, and for the purpose and with the design then and there thereby of obtaining from said Matilda K. Shepard the sum of forty-six dollars, of the money and property of her the said Matilda K. Shepard, then and there in her possession as aforesaid, upon a mortgage and pledge of said covered wagon as security for said sum of forty-six dollars, and to induce the said Matilda K. Shepard to advance and loan then and there to him the said Jacob N. Lincoln, upon the mortgage, pledge and security aforesaid, the said sum of forty-six dollars.

"And the said Matilda K. Shepard then and there believing the said false pretence of him the said Jacob N. Lincoln, so made as aforesaid, to be true, and being then and there deceived thereby, and being induced then and there thereby to advance and loan to him the said Jacob N. Lincoln the said sum of forty-six dollars, of the money and property of her the said Matilda K. Shepard, did then and there by reason of the false pretence aforesaid, so by said Jacob N. Lincoln to her made as aforesaid, advance, loan and deliver to him the said Jacob N. Lincoln the sum of forty-six dollars, of the money and property of her the said Matilda K. Shepard, and of the value of forty-six dollars, upon, for and in consideration of a mortgage and pledge of said covered wagon then and there made by said Jacob N. Lincoln to said Matilda K. Shepard, as and for security for said sum of forty-six dollars; and the said Jacob N. Lincoln did then and there unlawfully, knowingly and designedly, fraudulently make and deliver to said Matilda K. Shepard a mortgage and pledge of the said covered wagon as and for security for the said sum of forty-six dollars so as aforesaid advanced, loaned and delivered by said Matilda K. Shepard to said Jacob N. Lincoln, with intent then and there thereby to injure, cheat and defraud said Matilda K. Shepard; and the said Matilda K. Shepard by reason of the false pretence aforesaid, and being deceived thereby, did receive the pledge and mortgage of said covered wagon so by said Jacob N. Lincoln made as aforesaid, as and for security for the said sum of forty-six

dollars, so as aforesaid by her advanced, loaned and delivered to said Jacob N. Lincoln. And the said Jacob N. Lincoln did then and there unlawfully, knowingly and designedly, fraudulently obtain and receive from the said Matilda K. Shepard the said sum of forty-six dollars, of the money and property of her the said Matilda K. Shepard, by means of the false pretences aforesaid, and upon, for and in consideration of the mortgage and pledge of the covered wagon aforesaid therefor, as security therefor, by him the said Jacob N. Lincoln then and there made and given as aforesaid to her the said Matilda K. Shepard, and by her the said Matilda K. Shepard then and there received as security for the said sum of forty-six dollars, with intent then and there to injure, cheat and defraud said Matilda K. Shepard.

“Whereas in truth and in fact the said covered wagon was not then and there the property of him the said Jacob N. Lincoln; and whereas in truth and fact the said covered wagon was not then and there owned by him the said Jacob N. Lincoln, as he the said Jacob N. Lincoln then and there well knew.”

To this indictment the defendant demurred, and assigned the following causes of demurrer :

1. Because the only false pretence set forth is, that the defendant said he owned the wagon, whereas a false assertion as to title at the time of a bargain is not a false pretence within the statute.

2. Because the indictment only sets forth that Shepard delivered and the defendant received and obtained forty-six dollars; 't should state that she delivered “various bank bills or treasury notes or gold,” and that he received and obtained the same “of the value of forty-six dollars.”

3. Because it appears by the indictment that the money was advanced to the defendant as a loan upon certain security, to wit, the mortgage. The mortgage, therefore, and not the false pretence, was what induced Shepard to part with her money. He merely got a loan. At all events, she is presumed in law to rely on her mortgage, and not on the false pretence.

4. The indictment shows that the false pretence was made

with a view to negotiate the mortgage; the object of the false pretence was the inducing her to take the mortgage; the object of the mortgage was money. In law, the money is too remote to be the object of the false pretence. By the false pretence he only got credit; he got money by the mortgage.

5. The indictment alleges that he obtained the money by means of the false pretence, and upon, for and in consideration of the mortgage as security therefor. It should have been charged that she was induced to part with her money, and he obtained it, by means of the false pretence alone. And further charging that he obtained the money upon security is repugnant. The false pretence must have been the operative cause of the transfer.

6. The mortgage should have been set forth.

7. The indictment should have alleged *in totidem verbis* that Lincoln pretended he had sufficient title to the wagon to enable him to give her a good and valid mortgage thereon.

8. In that part of the indictment which charges the defendant with obtaining the money, the intent to cheat and defraud is not stated.

This demurrer was overruled, and the defendant, having been tried and found guilty, appealed to this court.

A. W. Boardman, for the defendant.

Reed, A. G., for the Commonwealth.

DEWEY, J. The court are of opinion that this indictment may be sustained, and that it sufficiently alleges a criminal offence made punishable by Gen. Sts. c. 161, § 54. The General Statutes and the previous statutes (Rev. Sts. c. 126, § 32, and St. 1815, c. 136, § 1) greatly extended the class of cases which are punishable as the offence of obtaining property by false pretences. These statutes have often been applied to false representations made upon the sale of property although their application to cases of ordinary contracts of this kind may be somewhat qualified. But in *Commonwealth v. Strain*, 10 Met. 523, the court had no doubt that where money was obtained by a sale of property effected by means of false pretences it was within the statute. The only difficulty there was, that the

indictment did not set out the means sufficiently. The false representation was, that the watch offered for sale was a gold watch, by means of which he obtained the money of the other party. In *Commonwealth v. Nason*, 9 Gray, 125, an indictment charging as a false pretence that a certain metallic substance which the defendant then had was a good and current gold coin, and that the person to whom the pretence was made, being deceived thereby, was thereby induced to receive the same as a good and current gold coin, and to deliver to the defendant in exchange therefor certain property, was sustained. In *Regina v. Burgon*, 7 Cox Crim. Cas. 131, a false representation as to property offered and accepted as security for a loan of money was held an offence within the statute punishing the obtaining of property by false pretences. *State v. Dorr*, 33 Maine, 498, is to the like effect. See also *Regina v. Dennison*, 9 Cox Crim. Cas. 158. The false pretence that the defendant was the owner of the wagon was an essential fact in this case, and the means by which the money was obtained.

It is not to be assumed that every alleged representation or false statement made at the time of obtaining the property of another is to be treated as the criminal offence of obtaining goods by false pretences. Proper limitations must be applied to cases as they occur. The present case seems to us to be embraced by the statute, it being both within the letter and the spirit of it. The fact that this was a conditional sale of the wagon can make no difference. The offence charged is, that the defendant obtained the money by false representations as to his ownership of the wagon; and whether the same was obtained by an absolute or conditional sale is immaterial, in reference to the nature of the offence.

No ground exists for the objection to this indictment, that it only sets forth that Matilda K. Shepard delivered and the defendant received from her forty-six dollars of the money and property of the said Shepard. *Regina v. Giles*, 10 Cox Crim. Cas. 44.

The indictment sufficiently alleges that the money was advanced and lent to the defendant by reason of the false pretence

## Commonwealth v. Walton.

set forth. By the effect of it the mortgage was made as incidental to the loan, and without it no money would have been lent.

In that part of the indictment which charges the defendant with obtaining the money, the intent to cheat and defraud is sufficiently stated.

*Demurrer overruled.*

## COMMONWEALTH vs. RICHARD W. WALTON.

Under a complaint dated "August 30, 1865," charging the commission of a continuing offence "on the first day of June in the year of our Lord one thousand eight hundred and sixty-five, and from that day to the day of the date of this complaint," evidence may be introduced covering the whole time between the first day of June and the date of the complaint.

If a complaint charges the keeping of a "tenement or shop" used for the illegal keeping and sale of intoxicating liquors, the objection that this charge is bad, because made in the alternative, is merely formal, within the meaning of *St.* 1864, c. 250, § 2, and must be taken before a judgment has been rendered in the original trial of the complaint.

The legislature have power to pass an act providing that formal objections to complaints and indictments must be made at a particular stage of the proceedings.

COMPLAINT made to the justice of the municipal court of Taunton, charging that the defendant "on the first of June in the year of our Lord one thousand eight hundred and sixty-five, and from that day to the day of the date of this complaint, did keep and maintain a certain tenement or shop then and there used for the illegal keeping and sale of intoxicating liquors." At the foot of the complaint, after the signature, were these words and figures: "Dated August 30, 1865. Bristol, ss. Received and sworn to the thirtieth day of August in the year one thousand eight hundred and sixty-five. Before the court, James P. Ellis, Clerk."

At the trial in the superior court, before *Wilkinson, J.*, after a conviction in and appeal from the municipal court, the defendant, before the jury were empanelled, moved that the complaint be quashed, because it was insufficient in charging that the defendant kept a "tenement or shop;" but the judge overruled

the motion, because it should have been made in the municipal court, and was not made there. The judge also ruled that a continuing offence from the day named to the date of the complaint was properly charged, and admitted evidence covering the whole of that period.

The defendant contended that *St.* 1864, c. 250, § 3, is unconstitutional; but the judge ruled otherwise.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

*J. Brown*, for the defendant.

*Reed, A. G.*, for the Commonwealth.

GRAY, J. 1. The allegation of time in this complaint was sufficient to warrant the admission of evidence of the offence charged, not only on the first day of June in the year of our Lord one thousand eight hundred and sixty-five, but also between that day and the day of the date of the complaint. The date of the complaint is made material by the express reference to it in the body of the complaint. The words "Dated August 30, 1865," define the day of the date in the same manner as is usual in the analogous case of the indorsement by the clerk on an indictment charging the commission of an offence on a particular day and from that day to the day of the finding of the indictment. *Commonwealth v. Stone*, 3 Gray, 454. *Commonwealth v. Langley*, 14 Gray, 21. The only effect of rejecting these figures as too uncertain would be to oblige the court, in order to ascertain the day of the date of the complaint, to refer to the day when it was received and sworn to, which is expressed in words at length in the certificate of the clerk of the court to which it was presented. *Gen. Sts. c. 170, § 10. Commonwealth v. Keefe*, 7 Gray, 332. The case is within the principle of those in which a complaint charging the commission of a similar offence on a day named, "and from that day to the day of the date of receiving," or "the day of exhibiting this complaint," with the last day stated in the jurat at its foot, has been held sufficient. *Commonwealth v. Kingman*, 14 Gray, 85. *Commonwealth v. Donnelly*, 14 Gray, 86, *note*. In a very recent case this court sustained a complaint like that now before us,

except in describing the date at the end of the complaint as "this fourteenth day of January A. D. 1864," and that in the jurat as "January 14th 1864." *Commonwealth v. Hagarman*, 10 Allen, 401.

The cases cited for the defendant are all distinguishable from this. In *Commonwealth v. McLoon*, 5 Gray, 91, the omission of the words "in the year," or the letters "A. D.," without which the figures "1855" were held insufficient to denote the year, was in the body of the complaint. In *Commonwealth v. Hutton*, 5 Gray, 89, the complaint contained no allegation of time except "the third day of June instant," and no reference to the date of the complaint. And in *Commonwealth v. Keefe*, 7 Gray, 332, in which the date was rejected as surplusage, the complaint did not refer to it, but duly set forth the time of the commission of the offence in words at length.

2. The *St.* of 1864, c. 250, § 2, requires that any objection to a "complaint, indictment or other criminal process, for a formal defect apparent on its face, shall be taken by demurrer or motion to quash," before a judgment has been rendered by a trial justice or a police court, or a jury has been sworn in the superior court; and by force of the *St.* of 1864, c. 209, § 21, this provision applies to the municipal court of Taunton. An objection to this complaint for a formal defect apparent upon its face could not therefore be made for the first time after judgment in the municipal court. If such an objection had been raised before judgment there, either by demurrer or motion to quash, and overruled, it might have been renewed in the superior court, and brought to this court by bill of exceptions. *Commonwealth v. McGovern*, 10 Allen, 193. The purpose of the *St.* of 1864, c. 250, was to require formal objections in criminal prosecutions to be made before submitting the whole case to the decision of a magistrate or jury, but not to deprive the accused of the right to obtain the judgment of this court upon any question of law, if seasonably suggested. The objection made to this complaint, that it only charged the defendant with keeping a "tenement or shop," was purely formal, within the statute.

3. There is in our opinion no ground for the argument of the

defendant's counsel that this statute violates the provision of the twelfth article of the Declaration of Rights, that "no subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him." The statute provides a method by which any person accused may raise any objection, however formal, before pleading the general issue. But if he neglects to take advantage of it before judgment or verdict against him on that issue, he must be held to have waived all formal objections. We can have no doubt of the power of the legislature to prescribe and limit the time when such objections shall be taken.

*Exceptions overruled.*

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COMMONWEALTH vs. JAMES GREENEN.

Keeping and maintaining a tenement used for the illegal keeping of intoxicating liquors may be proved by evidence of repeated illegal sales in the tenement, while it was fitted up as a bar-room.

COMPLAINT charging that the defendant "on the first day of June in the year of our Lord one thousand eight hundred and sixty-five, and from that day to the day of the date of this complaint, did keep and maintain a certain tenement then and there used for the illegal keeping and sale of intoxicating liquors." The date and jurat were in the same form as in the preceding case.

At the trial in the superior court, *Wilkinson*, J. ruled that a continuing offence from the day named to the date of the complaint was properly charged, and admitted evidence covering the whole of that period.

A witness testified that he knew the place where the defendant carried on his business; that it was a cellar fitted up as a bar room; that he had seen intoxicating liquors sold there by the defendant several times during the time covered by the complaint, and had himself bought such liquors of the defendant



three or four times during the period, and had seen others buy of him there. Another witness also testified to a single purchase by himself of the defendant during that period.

The district attorney conceded that the complaint did not well charge the keeping of a tenement used for the illegal sale of intoxicating liquors; and the defendant contended that the evidence was insufficient to prove the charge of keeping a tenement used for the illegal keeping of such liquors, and asked the court so to rule. But the judge instructed the jury that illegal sales were evidence tending to show illegal keeping, and submitted the question to them on the evidence; and they returned a verdict of guilty, and the defendant alleged exceptions.

*J. Brown*, for the defendant.

*Reed*, A. G., for the Commonwealth.

GRAY, J. The allegation of time warranted the introduction of evidence up to the date of the complaint, for the reasons stated in the case just decided of *Commonwealth v. Walton*, *ante*, 238.

The evidence of repeated sales of intoxicating liquors by the defendant in a cellar fitted up as a bar room was sufficient evidence to be submitted to the jury that the room was kept by him for the illegal keeping of intoxicating liquors, and was submitted to them under proper instructions.

*Exceptions overruled.*

**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME JUDICIAL COURT**  
**AT THE**  
**NOVEMBER SESSION 1865, IN BOSTON.**

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**PRESENT :**

HON. GEORGE T. BIGELOW,	CHIEF JUSTICE.
HON. CHARLES A. DEWEY,	} JUSTICES.
HON. EBENEZER R. HOAR,	
HON. REUBEN A. CHAPMAN,	
HON. JAMES D. COLT,	

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**CRIMINAL CASES.**

**COMMONWEALTH vs. FRANCIS O. J. SMITH.**

Under Gen. Sta. c. 131, § 33, a commissioner specially appointed by a court in another state, under authority of the laws of that state, to take a deposition in this commonwealth, to be used in a suit pending in that court, is appointed under the authority of that state, and is qualified to administer an oath and to require the attendance of a witness in this commonwealth.

An indictment for subornation of perjury in a deposition to be used in a civil action pending in another state, which alleges that on a certain day "a certain issue was then and there duly joined in the said suit" and that on the same day "a commission was duly issued" to take the deposition, sufficiently avers that issue was duly joined in the suit before the commission issued, and if, after a verdict of guilty, it appears by the bill of exceptions that evidence was introduced to show the pendency of the action, as alleged in the indictment, it will be presumed, in the absence of anything to show the contrary, that the evidence showed the pendency of an action in which issue had been duly joined.

If a commission duly issued in another state to take a deposition in this commonwealth

*Commonwealth v. Smith.*

directs the oath to be administered by causing the witness to lay his hand upon and kiss the gospels, the oath may be administered in that form, although the Gen. Sts. c. 131, § 8. prescribe a different form to be used here.

A combination to induce a witness to go from one state to another to testify, by means of pecuniary inducements, is not a conspiracy, unless the design is to induce him to testify falsely; and therefore the acts and declarations of one of the persons so combining are not admissible in evidence against the others.

If it is averred in an indictment for subornation of perjury that it became a material question in the trial of the cause in which the perjury was alleged to have been committed whether the wife of the person alleged to have committed it had or had not, previously to his marriage with her, been living with the defendant as his mistress, and that the witness was asked, "Had she not been living with the defendant before you married her," to which he replied that she had not, evidence is competent to prove, for the purpose of establishing the perjury, that in fact she had lived with the defendant as his mistress.

Under the statutes of this commonwealth, one may be convicted of subornation of perjury who procures the commission of the perjury here through the agency of another guilty party, without the limits of Massachusetts.

**INDICTMENT** for subornation of perjury. The indictment alleged, at great length, that on the 5th of December 1861 a cause was pending in the superior court of the city of New York in the state of New York in favor of Daniel H. Craig against the defendant, in which Craig sought to recover damages of the defendant for a libel in charging that Craig had cut the telegraph wires on the arrival of a foreign steamer to give a certain despatch the advantage of time over other despatches, and that he had a woman for an accomplice, and the defendant in his answer admitted the publication of the charge and alleged the truth in justification; "and a certain issue was then and there duly joined in the said suit and proceeding in a court of justice between the said Craig and the said Smith;" "that on the said fifth day of December in the said cause then and there so pending as aforesaid, a commission was duly issued out of the said superior court," directed to Edward Bangs of Boston, Massachusetts, appointing him commissioner to take the deposition of Charles C. Northrup as a witness in said cause, upon certain additional cross-interrogatories propounded to Northrup by Craig, and in pursuance thereof Northrup afterwards appeared and was sworn by said Bangs, who had authority to administer the oath, and took the oath by laying his hand upon and kissing the gospels; and certain questions became material in the said cause, and to the said issue between the said parties, and to be

deposed to by the said witness, in answer to the said additional cross-interrogatories, one of which was whether or not the wife of said Northrup had been living with Smith as his mistress before Northrup married her; and in the eighteenth cross-interrogatory the witness was interrogated, [amongst other things specified in the indictment, and hereinafter set forth,] "What was the name of your wife before you married her? Had she not been living with the defendant (meaning said Smith) before you married her? (meaning living with said Smith as his mistress:)" to which Northrup answered, "Lucy Peabody De Maine. She had not. (meaning that the said wife of said Northrup had not been living with the said defendant Smith as his mistress before said Northrup married her.) I answer the three last questions emphatically, No." That in truth and in fact, as Northrup well knew, his wife, before her marriage to him, had been living with the defendant as his mistress; that Northrup accordingly committed perjury; and that the defendant procured him to do so, at said Boston.

At the trial in the superior court, before *Putnam, J.*, evidence was introduced tending to show the pendency of an action in the superior court of the city of New York, as alleged in the indictment. A commission was then offered in evidence issued by said court to Edward Bangs to take the deposition of Charles C. Northrup in answer to additional cross-interrogatories propounded by Craig, and annexed to the commission. The instructions annexed to this commission directed that the oath to the witness should be administered by the witness laying his hand upon and kissing the gospels. The eighteenth additional cross-interrogatory was as follows: "What was the full name of your wife before you married her? Had she been previously married? Had she one or two children when you married her? Had she not been living with the defendant before you married her? Did the defendant not give you a sum of money or some telegraph stock or some other consideration, to induce you to marry your wife or to take one of her children? Does he not now assist to support these children?" To this interrogatory Northrup answered as follows: "Lucy Peabody De Maine.

She had been previously married ; at least, she was reported to be a widow, and I presume was. She had then two children. She had not. He did not. He does not. I answer the three last questions emphatically, No." The defendant objected to the admission of this commission, and of the interrogatories and answers, because the commission did not authorize Bangs to administer a binding oath ; but the objection was overruled.

For the purpose of showing perjury by Northrup in his answers to the above interrogatory, he and his wife, being called by the Commonwealth, were allowed to testify, against the defendant's objection, that for a series of years before their marriage she had been the mistress of the defendant and that he had supported her. Charles C. Northrup also testified that when the question was put to him he understood it to be an inquiry whether she was living with Smith as his mistress, and answered the question, so understanding it. The judge on this point instructed the jury that if Northrup so understood the question, and the phrase might from its connection be fairly so understood by him, and he so understanding it answered it as he did, perjury might be committed by him in such answer.

Northrup also testified that in the spring of 1863 he was in the army at Camp Butler in Chicago, Illinois, and one Rowe visited him there, as agent of Craig, to induce him to come to Boston to testify before the grand jury against Smith ; that he came to Boston accordingly in June 1863 ; that Rowe and Craig both promised that Craig would help him in securing a good position in the army, and they both paid him money. The defendant, contending that this evidence showed a conspiracy between Craig, Rowe and Northrup in this prosecution against him, offered in evidence two letters written by Craig to Rowe just before Northrup came to Boston in June 1863, respecting the procurement of Northrup as a witness, and his testimony. There was no evidence that Northrup had seen these letters or knew their contents ; and the judge excluded them.

Northrup also testified that in testifying falsely to the matters above set forth he was influenced by two letters written to his wife by the defendant, and by conversations with his wife in

reference to the subject matter of the letters. These letters were dated on December 31st 1861 and January 5th 1862 respectively. The first was sent to her in Portland, from Maine or New York. The second was dated in Portland, Maine, and the evidence was conflicting as to whether or not it was sent to her from Massachusetts. There was evidence tending to show that before Northrup gave his deposition she showed these letters to him, in pursuance of a request made to her by the defendant before they were written. She testified that this request was made to her in Boston, and that the defendant then told her that he wished her to get her husband to testify in a certain way, and promised to write her a letter stating how he was to answer the interrogatories, which letter and interrogatories she was to show to her husband. The defendant contended that he could not be found guilty upon this evidence; but the judge ruled that if the defendant employed her to solicit her husband to commit the perjury, and if he agreed to send to her a statement of what he wished her husband to testify to, which she was to read over to him, and the statement and copy of the interrogatories were accordingly sent to her, the contents of which she communicated to her husband in Boston, by which he was induced to testify falsely, then the defendant might be convicted under this indictment, although the letters and papers were written in Portland or New York, and forwarded to her by mail or otherwise.

The defendant then requested the judge to instruct the jury as follows :

"1. The commission to Bangs did not authorize him to administer to Northrup a binding oath in this state, and false statements by Northrup made upon an oath administered by Bangs in his capacity of commissioner, deriving his authority to administer such oath from that commission alone, would not be perjury.

"2. If the jury find that the defendant's letters of December 31st 1861 and of January 5th 1862 were written without the jurisdiction of this state, and were not brought to this state by the defendant himself, but were communicated to Northrup by the agency of some other party, and the defendant did no other

act to induce Northrup to commit the perjury alleged, he cannot be convicted upon this indictment, even though the contents of such letters were made known to Northrup and he was influenced by them to testify falsely.

"3. If letters written by the defendant and representations and promises made by him for the purpose of inducing Northrup to testify falsely were not communicated by the defendant himself to Northrup, but were communicated to him by his wife when the defendant was not present personally, and Northrup was influenced by such letters, representations and promises alone, thus made known to him, to testify falsely, the defendant cannot be convicted upon this indictment.

"4. To authorize a conviction of the defendant upon this indictment, the jury must find that the defendant was present, counselling and procuring the perjury by Northrup."

The judge declined to modify his former instructions, so as to make them conform to these requests, and the jury returned a verdict of guilty. The defendant alleged exceptions.

*H. W. Paine*, (*T. M. Hayes* with him,) for the defendant. The admission of the commission was erroneous. No officer can administer an oath but by authority of the state in which this official act is done. *Jackson v. Humphrey*, 1 Johns. 498. There is no statute expressly authorizing a commissioner appointed by a court of another state to administer an oath here. The Gen. Sts. c. 131, § 8, are restricted to commissioners appointed by the executive. In this case, it is not averred or proved that issue had been joined when this commission was issued. The instructions accompanying the commission directed the commissioner to disregard the injunctions of Gen. Sts. c. 131, § 8, as to the form of administering oaths. The letters of Craig should have been submitted to the jury, as there was evidence from which they would have been warranted in finding a conspiracy, and the act of one conspirator is evidence against the rest. 1 Greenl. Ev. § 111.

The evidence that Mrs. Northrup had lived with the defendant as his mistress was incompetent. The question actually put to Northrup in his deposition was simply, whether she had

not been living with the defendant before Northrup married her. It is nowhere averred in the indictment that this question was material to the cause. The significance of the question which was put clearly cannot be varied or added to by the innuendo. The indictment charges that it became a material question in the cause, and to the issue, and to be deposed to by the witness, whether she had lived with the defendant as his mistress. But this question was not put to the witness. The question which is alleged to have been material was not put; and the question which was put is not alleged to have been material. What the question meant which was put is a question of law. The judge allowed Northrup to testify what he understood that it meant. But is Smith to be affected by his understanding of what the question meant? Smith may have understood it differently. The relations in which a woman may live with a man are various. It may be as his wife or housekeeper or daughter or servant or boarder or mistress. Suppose that this question had been answered "yes;" could he have been convicted of perjury if it appeared that she had lived with him as a housekeeper, but not as a mistress? The judge did not undertake to interpret this question at all, but submitted the case to the jury upon Northrup's interpretation of it.

The instructions to the jury were erroneous. The indictment charges the defendant with subornation of perjury; not with being an accessory before the fact to a perjury. Subornation of perjury is a distinct and independent offence, both at common law and by Gen. Sts. c. 163, § 3; and there may be accessories before the fact to this offence. The defendant is charged with having committed this offence at Boston. Upon the facts mentioned in the instructions to the jury, Mrs. Northrup was guilty of subornation of perjury and the defendant was accessory before the fact thereto. If one procures an offence to be committed by an innocent agent, he is regarded as constructively present at the commission of the offence, and may be convicted as a principal. But if he procures the offence to be committed by a guilty agent, he is an accessory before the fact. *People v. Adams*, 3 Denio, 120; *S. C.* 1 Comst. 173. *State v. Chapin*, 17



Arkansas, 561. *State v Moore*, 6 Fost. (N. H.) 448. *State v Ricker*, 29 Maine, 84. *Commonwealth v. Douglass*, 5 Met. 245. 1 Russ. on Crimes, 32. *The King v. Reilly*, 1 Leach, (4th ed.) 455. 2 Stark. Ev. (4th Amer. ed.) 627. To constitute subornation of perjury, the party must be present, actually or constructively; he must act directly on the guilty party, and not through the intervention of another guilty party. But in this case, the instructions given imply Mrs. Northrup's guilt, and allowed the defendant to be found guilty even though his acts were not done in this commonwealth.

*Reed*, A. G., for the Commonwealth.

HOAR, J. The questions raised by the bill of exceptions are numerous, and it will be necessary to consider them in detail.

The defendant was indicted for wilfully and corruptly procuring one Charles C. Northrup to commit the crime of perjury. The perjury alleged was in the false answers given by Northrup in a deposition taken in Boston, under a commission from the superior court of the city of New York, and to be used in the trial of a cause depending and at issue in that court. The commission was directed to a commissioner specially named, who was not shown to have any other authority to execute it than that derived from the appointment of the court.

The first exception is to the admission of the deposition in evidence, because the commission did not authorize the commissioner to administer a binding oath to said Northrup in this commonwealth. And in support of this exception several distinct points are taken.

1. It is urged that the commissioner was not authorized by any law of this commonwealth to take the deposition. The provision of law for the taking of depositions within this state, to be used in a cause pending in a court in any other state or government, is found in Gen. Sts. c. 131, § 38. It provides that such depositions "may be taken before a justice of the peace in this state, or before commissioners appointed under the authority of the state or government in which the suit is pending." We think that under this section the commissioner had authority to administer an oath; and that, within its meaning, he was

appointed under the authority of the state of New York. The statute may have had more special reference to commissioners appointed by the executive, for the purpose of administering oaths and taking depositions generally in the state for which they are designated; but it will include as well commissioners appointed under the judicial authority of the state as those appointed by the executive. Our own statute respecting depositions to be taken in other states or countries, to be used in this commonwealth, allows them to be taken under a commission issued by the court in which the cause is pending, to competent persons, that is, to persons not disqualified by interest or otherwise, or before commissioners appointed by the governor for that purpose. Gen. Sts. c. 131, § 34. And the reason of the thing is equally applicable to depositions taken in either mode under the authority of another state; which may be as efficiently exercised through the legitimate action of a court of record as by an executive appointment.

2. It is objected that it was neither averred nor proved that issue was joined in the cause depending in the superior court of New York from which the commission was sent; and that the statute of New York empowers a court of record to appoint a person to take the depositions of witnesses out of the state, only after issue joined in a cause. But on looking at the indictment we find it is distinctly averred that on the day named a cause was depending, and that an issue was then and there joined in the cause between the parties; and that on the same day "in the said cause then and there so depending as aforesaid a commission was duly issued." This is a sufficient allegation; and there is nothing in the exceptions to show that it was not supported by proof. Evidence was offered "to show the pendency of an action as alleged in the indictment." We must presume that this evidence showed an action in which issue was duly joined. Nothing to the contrary is stated, and there is no fact reported upon which the objection can be sustained.

3. It is then argued that the instructions accompanying the commission directed a particular form of administering the oath,

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*Commonwealth v. Smith.*

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namely, by causing the witness to lay his hand upon and kiss the gospels ; and that this form of administering the oath is not the lawful form in this commonwealth, unless in cases where it is found to be more binding upon the conscience of the witness than the form directed by our statute. By Gen. Sts. c. 131, § 8, it is provided that "the usual mode of administering oaths now practised in this state, with the ceremony of holding up the hand, shall be observed in all cases in which an oath may be administered by law," except in cases of conscientious scruples, or where the court or magistrate is satisfied that some other mode is more solemn or obligatory on the person to be sworn than holding up the hand. It is undoubtedly important and desirable that some proper and solemn form of administering oaths should be adopted and observed, and the injunction of the statute is to be regarded for this purpose. But the holding up the hand is a ceremony attending the taking of the oath, and is not to be regarded as of the essence of the oath itself. If this were not so, a person without hands and having no conscientious scruples or opinions in regard to the form could not be legally sworn to testify in this commonwealth. The provision as to the form is to be considered as directory only ; and the oath administered by the commissioner was valid and effectual to oblige the witness to testify.

The next exception to be considered is that taken to the exclusion of the letters written by Craig to Rowe, which were offered in evidence on the ground that there was proof of a conspiracy between Craig, Rowe and Northrup, and that therefore the acts and declarations of either of them were admissible against the others. The rule of evidence for which the defendant contends is well established, but we do not think the facts proved were sufficient to show a conspiracy, and so the case is not brought within the rule. A conspiracy must be to do an unlawful or criminal act. The proof only tended to show that Craig and Rowe had acted in concert to induce Northrup to come into this commonwealth to testify, and had offered him pecuniary inducements to do so. But this is not criminal or illegal. It does not appear that they tried to induce him to

testify to anything which was not true. The ruling at the trial was therefore right.

The next point taken arises upon the admission of evidence that the wife of the witness Northrup, before her marriage with him, lived with the defendant as his mistress. The objection to this evidence was that it was irrelevant, and tended to prove no allegation in the indictment, but only matters mentioned in the innuendoes therein.

It is averred in the indictment that the question became material in the cause and in the issue between the parties, whether the wife of the said Northrup had been living with the defendant Smith as his mistress, before the said Northrup married her. It is then alleged that in the eighteenth additional cross-interrogatory propounded to the witness he was interrogated as follows: "Had she not been living with the defendant (meaning said Smith) before you married her?" (meaning living with said Smith as his mistress,) and that to this interrogatory the witness falsely, wilfully and corruptly answered that "she had not," and "No." The point upon which the defendant relies is, that the material question was whether she had lived with him as his mistress; that the interrogatory propounded was whether she had lived with him; that the question averred to be material was not asked, and the question asked is not averred to be material.

The crime of perjury is the taking of a wilful false oath, by one who, being lawfully required to depose the truth in any judicial proceeding, swears absolutely in a matter material to the point in question. The testimony must not only be wilfully false, but it must be material to the issue. The prosecutor must prove that it is thus material; and it is also necessary that it should be alleged in the indictment that the matter sworn to was material, or that the facts set forth as sworn to, and upon which the perjury is assigned, should be sufficient in themselves to establish the materiality. *The King v. Nicholl*, 1 B. & Ad. 21. *Commonwealth v. Pollard*, 12 Met. 225, and cases there cited. But it is not essential that the interrogatory propounded to the witness should be set forth in the indictment, unless it is

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Commonwealth v. Smith.

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necessary to make the answer which he gives intelligible. It is not even requisite that any specific interrogatory should have been put to him, since the perjury may be committed in the course of his own relation of the facts. *Commonwealth v. Knight*, 12 Mass. 273. And we think the defect in the defendant's argument upon this point is, that it confounds the question at issue with the interrogatory put to the witness. The usual form in indictments for perjury is to aver that "it then and there became and was a material question upon the issue aforesaid." But the word "question" there means "subject of inquiry." If the indictment sets out a material subject of inquiry, upon which the witness was called to testify, and in answer to any question, or without any specific question, in his statements made while testifying, it shows that he gave testimony on that subject which was material, and that his testimony was wilfully false, it contains a sufficient description of the perjury. It is certainly not necessary that the interrogatory to the witness should be such that every possible answer that could be given to it would be material to the issue, in order to admit of an assignment of perjury in an answer. On the contrary, if a question is asked upon a material subject of inquiry in a cause, which, answered affirmatively, might or might not furnish material evidence, but which, answered in the negative, necessarily includes and covers something that is material, then we can have no doubt that a negative answer wilfully and falsely made is perjury. It is in the answer that the perjury is committed; and it must appear by the indictment, either by direct averment or from the matter shown on the record, that the answer was material. In the indictment before us, whether the wife of Northrup lived with Smith as his mistress before her marriage is directly averred to have been a material question upon the issue in the cause. Neither the interrogatory put to the witness nor the answer made by him is directly averred to have been material. Unless, therefore, the answer appears to have been material without such averment, the objection must prevail. We give no effect to the innuendo enlarging the meaning of the interrogatory. We have only to consider whether, as it was propounded to the

witness, it allowed and received an answer wilfully false upon what appears by the indictment to have been material to the issue. And it is very clear that it did. To testify that she never lived with Smith was to testify that she never lived with him as his mistress. That the answer included more than was material makes no difference. It expressly negatived an essential part of a fact in issue which the indictment averred to be material.

To say that if the witness had answered truly, his testimony would have established no material fact, does not meet the proposition. That may be true. The interrogatory was merely whether his wife did not live with Smith before her marriage; and if he had said that she did, it would not have proved that she lived with him as his mistress, which was the fact averred to be material. If he had said that she did, and that had been untrue, there is nothing in the averments in this indictment which would show that such an answer, though wilfully false, would have been perjury. But the interrogator may not have intended, certainly he was not bound, to prove the whole of the material fact by this witness. Yet his question admitted, and the witness chose to give, an answer that was material; which did not merely avoid the material subject of inquiry, but was evidence expressly negating the fact which it was material to establish in the cause. The evidence offered and admitted was therefore competent under the averments of the indictment.

The remaining exceptions are those taken to the instructions given to the jury at the trial, and to the refusal of the judge to give the instructions asked by the defendant. The instruction which relates to the authority of the commissioner to administer the oath has been already disposed of. The others may be considered together, and they all depend upon three propositions, on which the defendant relies :

1. That subornation of perjury is a substantive felony, and not governed by the rules which would apply to the crime of being an accessory before the fact to perjury.

2. That if the defendant sent a letter to Northrup for the purpose of inciting him to commit perjury, and thereby procured him to commit that crime, if the person by whom the letter

was sent knew and participated in the guilty purpose and procurement, the defendant cannot be convicted of subornation of perjury, but only of being an accessory before the fact to the felony of subornation committed by the person who carried the letter.

3. That if the defendant, when out of the jurisdiction of this commonwealth, wrote a letter to Mrs. Northrup with the intent and understanding with her that she should communicate its contents to her husband to incite and procure him to commit perjury in the Commonwealth, and she did so communicate them, and he was thereby incited to commit the perjury, the defendant could not be convicted upon this indictment.

There are undoubtedly some peculiarities respecting the crime of perjury, both at common law and as affected by statute. Thus it may be doubted whether more than one person can be charged with perjury in one indictment; or whether the presence, when the false testimony is given, of a person who has counselled and procured the perjury to be committed, makes him a principal in the crime. The case in which it was held that several persons cannot be joined, appears, however, to have been a case of distinct perjuries. *Rex v. Philips*, 2 Stra. 921. But two persons have been joined without objection in a prosecution for subornation of perjury. *Regina v. Rhodes*, 2 Ld. Raym. 886. And one defendant has been charged with perjury, and another with suborning him to commit it, in the same indictment. *Regina v. Goodfellow*, 2 Russ. on Crimes, 622, note o. The crime of subornation of perjury is clearly in its nature that of an accessory before the fact to the perjury. Both perjury and subornation are felonies under our statute, being punishable by imprisonment in the state prison. Gen. Sts. c. 163, §§ 1, 2, 3. c. 168, § 1.

Whoever procures a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact, for it is not necessary that there should be any direct communication between the accessory and the principal. *Rex v. Cooper* 5 C. & P. 535. Foster's Crown Law, 125. 2 Hawk. c. 29, §§ 1, 10 *Earl of Somerset's case*, cited in 19 Howell's State Trials, 804.

And the accessory is a felon, though his felony is different in kind from that of the principal. Foster's Crown Law, 343. So it is said to be a principle in law which can never be controverted, that he who procures a felony to be done is a felon. 1 Russ. on Crimes, 32.

We cannot see that the application of these principles is changed, when the crime of the accessory before the fact is made by statute a substantive felony. The object of making it a substantive felony may be either to provide a distinct or milder punishment upon conviction, or to authorize the indictment and conviction of the accessory where the principal has not been convicted. But whether the crime is made the subject of separate prosecution and punishment or is to be included in an indictment with the principal offence will not, in the opinion of the court, change the definition of it, or alter the facts or circumstances in which the commission of it consists. The same facts, to be averred and proved in the same way, will substantiate the crime in one case as in the other. Thus, without any special provision of statute, any one inciting or counselling a murder afterward committed would be an accessory before the fact, whether he incited or counselled the actual perpetrator directly or through the intervention of another accessory. So he that procured the commission of perjury was guilty of subornation of perjury, whether his procurement was immediate or by the instrumentality of another suborner. In either case a change in the mode of indictment would not change the proof of what constitutes the crime. The crime of inciting or counselling the murder could be committed by the same person and by the same acts, although the guilt of the accessory were made a substantive felony, to be punished without reference to the prosecution of the principal. The crime of subornation of perjury would consist in procuring perjury to be committed, directly or indirectly, as much after subornation was made a felony as before.

In construing the provisions of Gen. Sts. c. 168, we must have reference not only to their apparent design and meaning, but to other provisions of the body of laws, of which that chapter forms a part. The first section gives a new and technical



definition of felony, differing from that of the common law. The common law incidents of felony would generally be held to attach to the felonies thus defined; but they would not be so held, where such a result would conflict with other statute provisions. Thus, § 4 provides that "whoever counsels, hires or otherwise procures a felony to be committed may be indicted and convicted as an accessory before the fact, either with the principal felon, or after his conviction; or may be indicted and convicted of a substantive felony, whether the principal felon has or has not been convicted, or is or is not amenable to justice; and in the last mentioned case may be punished in the same manner as if convicted of being an accessory before the fact." This section materially alters the common law in relation to the indictment and trial of accessories. But it was held in *State v. Ricker*, 29 Maine, 84, in construing a similar statute of the state of Maine, that the defendant must still be charged in the indictment as an accessory and not as a principal. And on the other hand, we cannot suppose that the provision as to punishment would apply to a case where the accessory is expressly made subject to a penalty less than that allotted to the principal, as in c. 160, §§ 15 and 16. The section makes a general provision for the case of accessories before the fact to felonies, which is made to some extent in other parts of the statutes in regard to particular felonies, and for which there is a different provision elsewhere in regard to others. It is undoubtedly specially designed for the case of accessories to felonies before the fact for which no other provision is specifically made; but we see no reason why it is not applicable to all cases within the scope of its terms, when not inconsistent with any other statute.

A similar rule of construction may be applied to § 5, which declares that "a person charged with the offence mentioned in the preceding section"—that is, with the offence of counselling hiring or otherwise procuring a felony to be committed—"may be indicted, tried and punished in the same court and county where the principal felon might be indicted and tried, although the offence of counselling, hiring or procuring the commission

of such felony is committed on the high seas or on land within or without the limits of this state."

Applying the two sections to the case at bar, the result of the views we have expressed may be stated thus. Perjury is a felony by statute. Whoever procures any felony to be committed may be indicted and convicted of a substantive felony under § 5. Subornation of perjury, consisting in procuring the felony of perjury to be committed, has been made a substantive felony by Gen. Sts. c. 163, § 3. But making it a felony does not change the definition of the crime, or make it any the less subornation to procure the commission of perjury through the agency of another guilty party, any more than the general provision that one who procures a felony to be committed may be indicted for a substantive felony changes the definition of what will constitute an accessory. The 5th section makes any one who procures a felony to be committed liable to indictment and conviction in the county in this state in which the felony was actually committed, although the procurement was made without the limits of the state. It is equally applicable in its terms and in its reason to the case where the procurement is also made a substantive felony in some other chapter and section of the statutes. The defendant was charged in the indictment with procuring Northrup to commit the felony of perjury, and it was averred and proved that Northrup committed that felony in the county of Suffolk. The defendant might therefore be indicted and convicted in the same county, although he wrote the letter which incited and procured the perjury out of the state, and its contents were communicated to Northrup by an agent who participated in his guilty purpose.

*Exceptions overruled.*

A new trial was subsequently granted in this case, in the superior court, by *Pulnam, J.*, for newly discovered evidence.

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Commonwealth v. Traverse.

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## COMMONWEALTH vs. MICHAEL TRAVERSE.

A complaint alleging that the defendant was a common seller of intoxicating liquors "on the third day of April in the year of our Lord eighteen hundred and sixty-five, within six months last past," can only be supported by proof that he was a common seller on said third day of April.

COMPLAINT dated April 3d 1865, charging that the defendant "on the third day of April in the year of our Lord eighteen hundred and sixty-five, at Newton in the county of Middlesex, within six months last past," was a common seller of intoxicating liquors in violation of law.

At the trial in the superior court, before *Wilkinson, J.*, on appeal from the judgment of the magistrate, convicting the defendant, the district attorney offered no evidence of sales on the 3d of April 1865, but relied upon evidence of sales made at several times within six months before that day. The defendant objected to this evidence, but it was admitted, and the defendant was found guilty, and alleged exceptions.

*R. D. Smith*, for the defendant.

*Reed, A. G.*, for the Commonwealth.

DEWEY, J. A well settled distinction has long prevailed as to the mode of alleging the time of the commission of an offence which consists of a single act, and that adopted in that class of cases where the alleged offence consists of a series of distinct acts. In the former, the precise day alleged is not material, and the evidence of such single act before or since the day alleged, if before the finding of the indictment, and within the period permitted by the statute of limitations, is sufficient.

On the other hand, in the cases where the offence consists of a series of acts, the practice is to allege the same to have been committed on a certain day named, and on divers days and times between that day and some subsequent day named. The allegation that the acts were done between a certain day named and the day of the finding of the indictment has also been held sufficiently to designate the time of the commission of the offence. This form of stating the time, as allowed in this class

of cases, gives to the prosecutor great latitude in the allegation of time, but, having fixed it by the indictment, the government is bound by it. And this has been held to be the rule where the acts constituting such offence are alleged to have been committed on a certain day named. The evidence must be confined to that day, and evidence of the commission of the offence before or after that day is incompetent. *Commonwealth v. Elwell*, 1 Gray, 462. *Commonwealth v. Gardner*, 7 Gray, 494. *Commonwealth v. Sullivan*, 5 Allen, 513.

The further inquiry is, whether this complaint has properly charged an offence on any other day than the third day of April. We are not disposed to favor any greater laxity in the form of the indictment in this class of cases than has been already sanctioned. Here the usual order of such allegation of the time is reversed. Instead of alleging the commission of the offence on a certain day, and on divers days and times subsequently between that day and a day named, the allegation is "within six months last past." We do not say that this charge would be fatally bad, had there been no other defect in stating the time. But there is no connecting word between the allegation of an offence committed on the third of April, and the further allegation, "within six months last past." It may be read as an averment that the third day of April was within six months last past. We think the only offence properly charged here is that of being a common seller of intoxicating liquors on April 3d 1865. As already stated, the allegation as to time is a material one, and the government must prove the offence to have been committed on that day

*Exceptions sustained.*

## COMMONWEALTH VS. JAMES KEENAN.

A license granted under *St.* of U. S. of 1862, c. 119, does not authorize the sale of intoxicating liquors in this commonwealth, in violation of the statutes of this commonwealth. If the defendant on the trial of an indictment against him for selling intoxicating liquors in violation of the statutes of this commonwealth, puts in evidence a license, under *St.* of U. S. of 1862, c. 119, authorizing him to sell such liquors at retail, and granted before the act charged against him in the indictment, and in force at that time, that fact may be taken into consideration by the jury, in determining whether or not he is guilty.

COMPLAINT for making a single sale of intoxicating liquors.

At the trial in the superior court, on appeal, before *Lord, J.*, the defendant put in evidence a license, granted under *St.* of U. S. of 1862, c. 119, authorizing him to sell liquors at retail, and granted before the act charged against him in the indictment, and in force at that time, and requested the court to rule that this license authorized him to sell intoxicating liquors at retail; but this request was refused. The defendant then asked the court to instruct the jury that they were not authorized to regard the fact that the defendant procured the license as evidence tending to prove the particular sale charged against him in the complaint. The judge substantially so ruled, but added that he could not prevent the jury from considering that fact in weighing the probabilities of the conflicting theories of the parties as to the defendant's having made the sale as charged, the license having been put in by him.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

*J. M. Day*, for the defendant.

*Reed, A. G.*, for the Commonwealth.

BY THE COURT. 1. The license from the United States gave the defendant no authority to retail intoxicating liquors in violation of the laws of this commonwealth.

2. The exceptions do not show that the jury were not instructed that, to convict the defendant of the offence charged, they must be satisfied beyond a reasonable doubt that he was guilty; and we must presume that they were so instructed. In determining whether he was guilty, circumstantial evidence,

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Commonwealth v. Barry.

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competent in its own nature, and lawfully introduced, might certainly be considered by the jury. As the defendant put his license in evidence, he cannot object to its competency. What the theory of the prosecution was, or what was the theory of the defence, is not stated; but if competent evidence made one of the theories appear more probably true, it would tend to support it, and might well be considered by the jury. If the defendant had taken a license to sell intoxicating liquors at a certain place, it would so far show that he had made preparations to carry on the business there, and would be a circumstance somewhat similar in its nature to the putting up of his sign over the door, or procuring the ordinary implements of the traffic. The fact that the evidence was slight, and not in itself sufficient to convict, is no reason to hold it inadmissible, or entitled to no weight whatever in connection with other evidence.

*Exceptions overruled.*

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COMMONWEALTH vs. PARKER H. BARRY.

The omission of the judge to reduce to writing his instructions in a criminal case and file them with the clerk before the jury retire to deliberate on their verdict is no ground for setting aside a verdict of guilty, if the defendant did not request him to do so and has sustained no injury by the omission.

INDICTMENT for keeping and maintaining a tenement in School Street in Boston, used for the illegal sale and illegal keeping for sale of intoxicating liquors.

At the trial in the superior court, before *Vose*, J., instructions were given to the jury which were not excepted to. The judge did not reduce to writing the instructions so given to the jury before they retired to deliberate on their verdict, and did not file them in the case. The jury returned a verdict of guilty, and immediately thereafter the defendant's counsel requested the court to show him the instructions given to the jury. The judge informed him that they were not in writing, but that he would put them in writing and hand them to the counsel if he desired

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Commonwealth v. Waite.

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it, to which the counsel replied that he would not trouble the court so far. The defendant thereupon moved for a new trial, on account of the omission to reduce the instructions to writing and file them in the case. This motion was overruled, and the defendant alleged exceptions.

*E. K. Phillips*, for the defendant.

*Reed*, A. G., for the Commonwealth.

BIGELOW, C. J. It is not contended that the instructions given to the jury in this case are not correctly and fully stated in the exceptions, or that they are in any respect defective or erroneous. The mere omission of the court to reduce them to writing and file them with the clerk before the jury retired to deliberate on their verdict, as required by *St.* 1863, c. 180, § 1, has worked no harm or prejudice to the defendant. He is not, therefore, aggrieved by the failure of the judge to comply with the strict letter of the statute, and has no ground whatever for exceptions. It is not the province of the defendant to assert or maintain a rule of law where the omission to observe it has been the cause of no injustice towards him.

*Exceptions overruled.*

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#### COMMONWEALTH vs. HORACE H. WAITE.

The legislature have power to make it a criminal offence to sell pure milk mixed with pure water.

A certificate of the result of an analysis of milk, by a sworn inspector appointed under *St.* 1864, c. 122, is admissible in evidence in a criminal prosecution under that statute, provided he also testifies at the trial to the same facts which are stated therein; and in such case the admission of the certificate in evidence before he testifies furnishes no ground for a new trial, after a verdict of guilty.

INDICTMENT for selling adulterated milk. The defendant filed a motion to quash the indictment, on the ground that the indictment set forth no offence; but the motion was overruled.

At the trial in the superior court, before *Putnam*, J., the district attorney was allowed, under objection, to put in evidence a certificate of the result of an analysis of milk by Dr. James C White, a sworn inspector of milk appointed under *St.* 1864.

c. 122, which showed that the milk in question consisted of sixty-two parts and a fraction of pure cow's milk, and thirty-seven parts and a fraction of water intentionally added. This certificate was objected to on the ground that "the legislature had no power to make it evidence." Dr. White testified to all the facts set forth in the certificate.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

*J. F. Pickering*, for the defendant. The *St.* of 1864, c. 122, is unconstitutional. It is no crime to sell pure milk and water, either separately or mixed, provided no fraud is used. A subsequent statute, *St.* 1865, c. 194, has made it criminal to sell adulterated milk, to be manufactured into butter, with intent to defraud. This shows that prior to this statute such sale was not criminal, and there is nothing in this case either averred or proved to show that the present sale was not for that purpose. The admission of the certificate was in violation of the Declaration of Rights, art. 12.

*Reed*, A. G., for the Commonwealth.

CHAPMAN, J. It has been settled that it is an offence against *St.* 1864, c. 122, to sell milk adulterated by water, and that guilty knowledge on the part of the seller need not be alleged or proved. *Commonwealth v. Farren*, 9 Allen, 489. *Commonwealth v. Nichols*, 10 Allen, 199.

The defendant in this case contends that the statute is unconstitutional, because it is in derogation of common right. The substance of the argument is this: It is innocent and lawful to sell pure milk, and it is innocent and lawful to sell pure water; therefore the legislature has no power to make the sale of milk and water, when mixed, a penal offence, unless it is done with a fraudulent intent. But it is notorious that the sale of milk adulterated with water is extensively practised with a fraudulent intent. It is for the legislature to judge what reasonable laws ought to be enacted to protect the people against this fraud, and to adapt the protection to the nature of the case. They have seen fit to require that every man who sells milk shall take the risk of selling a pure article. No man is obliged to go into the



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business; and by using proper precautions any dealer can ascertain whether the milk he offers for sale has been watered. The court can see no ground for pronouncing the law unreasonable, and has no authority to judge as to its expediency.

The second section provides for the appointment of inspectors of milk, to analyze or test milk, and make and record a certificate of the result, and it further provides that such certificate when sworn to shall be admissible in evidence in all prosecutions under the act. A certificate of Dr. White, who was an inspector, was admitted in evidence in this case, and it is objected that the legislature had no power to make it evidence in a criminal case. But it further appears that he was a witness in the case, and testified to all the facts set forth in the certificate. We think this destroys the force of the objection, whatever it might have been otherwise. *Exceptions overruled.*

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COMMONWEALTH *vs.* LUKE NORTON.

To obtain money of another by falsely representing to him that on a previous occasion he had omitted to return the proper change to the person making the representation, and thereby inducing him to correct the supposed mistake, is not punishable criminally under Gen. Sts. c. 161, § 54.

**INDICTMENT** for obtaining money under false pretences. The first count charged that the defendant falsely pretended to Charles Connell that a few days before he, the defendant, was in Connell's place of business and had two drinks, and gave to Connell five dollars, from which Connell was to take twenty cents, but that Connell did not return any change; and Connell, believing said false representations, and being deceived and induced thereby, paid to Norton four dollars and eighty cents whereas in truth Norton had not given the five dollars to Connell, and the various representations of Norton were all false.

There were three other counts charging similar transactions with other and different persons.

The defendant pleaded guilty to this indictment in the superior court, and thereupon *Lord, J.*, deeming the questions of law arising thereon, as to whether the allegations of the indictment constituted an indictable offence, so important and doubtful as to require the decision of this court, reported the same, by the consent and desire of the defendant.

No counsel appeared for the defendant.

*Reed, A. G.*, for the Commonwealth, cited *Commonwealth v. Drew*, 19 Pick. 182; *The People v. Johnson*, 12 Johns. 293; *Young v. The King*, 3 T. R. 102; *Rex v. Wheatly*, 2 Burr. 1128.

*DEWEY, J.* It seems to us that the present case is one which the court may properly consider as not embraced within the intention of the framers of the statute punishing the obtaining of goods by wilfully false pretences. The case as presented by the indictment is the naked case of a wilfully false affirmation, made to a party who had like means of knowledge whether the affirmation was true or false as the party who made it. The indictment alleges the false statements to have been that the same person alleged to have been defrauded had on a previous day named received of the defendant a certain bank bill for the payment of certain "drinks" furnished to the defendant, and had not given back any change. The case was one of a demand of money as of right, growing out of what might have been an illegal sale of liquors, and was yielded to by the seller, he being personally connected with all the alleged facts, and voluntarily submitting to the demand thus made upon him. It was said by this court in *Commonwealth v. Drew*, 19 Pick. 184, that "although the language of the statute (*St. 1815, c. 136*) is very broad, and in a loose and general sense would extend to every misrepresentation, however absurd or irrational or however easily detected; yet we think the true principles of construction render some restriction indispensable to its proper application. . . . It may be difficult to draw a precise line of discrimination applicable to every possible contingency, and we think it safer to leave it to be fixed in each case as it may occur."

These remarks apply equally to Gen. Sts. c. 161, § 54, and in the opinion of the court the facts alleged in this indictment do

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not present a case which should be held to fall within the spirit and purpose of the statute. We are aware that some of the English judges have given a more extended construction of their statute in cases that have there arisen.

*Judgment arrested.*

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## SUFFOLK COUNTY.

HENRY K. OLIVER *vs.* WASHINGTON MILLS.\*

SAME *vs.* PRESIDENT, DIRECTORS AND COMPANY OF THE  
WEBSTER BANK.

SAME *vs.* FIREMEN'S INSURANCE COMPANY.

SAME *vs.* BOOTT COTTON MILLS.

The legislature have no power to pass a statute requiring domestic corporations to reserve and pay into the treasury of the Commonwealth a certain portion of all dividends declared by them on shares of non-resident owners.

THE *first* of these was an action of contract brought by the treasurer of the Commonwealth against a corporation created by *St.* 1858, c. 124. The declaration alleged that by *St.* 1863, c. 236, the corporation became obliged to reserve from each and every dividend one fifteenth part of that portion due and payable to holders of stock residing out of the Commonwealth, and to pay the same to the treasurer of the Commonwealth within ten days after such dividend should be declared payable; that on the 12th of June 1863 the corporation declared a dividend of ten dollars on each share of its capital stock, and on the 18th of said June made a return as required by law, a copy of which was annexed, [showing the names of non-resident owners of shares, to the number of 2408,] and that the corporation thereupon became bound to reserve the sum of \$1605.33, and pay the same to the treasurer of the Commonwealth on the 22d of said June; yet, though requested, the corporation had not paid the same.

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\* These cases were argued in March 1865.

There was another similar count, founded upon a subsequent dividend.

The parties agreed that the facts set forth in the declaration were true ; and judgment was rendered in the superior court for the plaintiff, and the defendants appealed to this court.

The *second*, *third* and *fourth* were actions of contract against other corporations of this commonwealth, and the allegations of the declarations were similar to those in the first case. In each of these cases the defendants filed a general demurrer, which was sustained in the superior court, and judgment ordered for the defendants ; and the plaintiff appealed to this court.

*Reed*, A. G., for the plaintiff. The property taxed by the statute in question is the stock of the corporations. The title of the act shows this.\* When there is an ambiguity in the words of a statute, the title will aid in determining the intention of the legislature. *United States v. Fisher*, 2 Cranch, 386. *United States v. Palmer*, 3 Wheat. 631. The words of section 1 of the statute also show this. If not a tax on the stock, it is a tax on the dividend, as money in the hands of the corporation which is the gain, profit and income of business done in this commonwealth. This is a legal subject of taxation, whether it be stock or dividend. Our own citizens may be compelled to pay to the Commonwealth any proportion of their dividends on corporate stock. The fact that this property belonged to non-residents affords no ground for holding the act imposing the tax to be void. Our constitution authorizes, or certainly does not forbid, the taxing of all property

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\* St. 1863, c. 236. "An act to levy a tax on the stock of corporations held by persons whose residence is out of the Commonwealth." Section 1 is as follows: "Every corporation organized under a charter or under general statutes, paying dividends in scrip, stock or money, shall reserve from each and every dividend one fifteenth part of that portion due and payable to its stockholders residing out of the Commonwealth, and shall pay the same as a tax or excise, on such estate or commodity, to the treasurer of the Commonwealth, within ten days after such dividend is declared payable ; *provided*, that this act shall not apply to stock standing in the name of executors, administrators or trustees, when the income is payable to persons residing in this state so that the stock is liable to taxation under existing laws." This statute was repealed by St. 1864, c. 208, § 18

within the state, no matter to whom it belongs. There is no restraint upon the power of the legislature to lay taxes, except such as the constitution of the United States or that of the state imposes. See *McCulloch v. Maryland*, 4 Wheat. 429; *Osborn v. Bank of United States*, 9 Wheat. 738; *Plowden v. City Council of Charlestown*, 2 Pet. 449; *Providence Bank v. Billings*, 4 Pet. 514; *Hoyt v. Commissioners of Taxes*, 23 N. Y. 224; *Catlin v. Hull*, 21 Verm. 152. The term "commodity" in our constitution is of a broad enough signification to include the property taxed in this case. *Commonwealth v. People's Savings Bank*, 5 Allen, 428, 435. *Portland Bank v. Apthorp*, 12 Mass. 256.

The additional fact that by the statute a tax is imposed only on non-residents does not make the statute invalid. Even if it is admitted that the provision of the constitution of the United States (art. iv. § 2) was intended to protect citizens of each state from a higher tax upon their property than was imposed upon citizens of the state where the property chanced to be, yet this provision cannot be construed to forbid a state to impose a different tax, or to provide for its collection in a different manner, in case of residents and non-residents, provided the tax imposed on the non-resident is not higher than the resident is obliged to pay. Various of the states provide for a different process in suits against non-residents. See *Campbell v. Morris*, 3 Har. & McHen. 535; *Ward v. Morris*, 4 Har. & McHen. 341. And this course may be necessary. If then the tax imposed on non-residents is not higher than that which citizens are obliged to pay, the constitution of the United States does not forbid it. In considering whether it is higher, we must look at all the legislation of the state authorizing taxation. The tax is not so high as those imposed on citizens. At all events, the court cannot know that it is so. We pay a tax on stock *eo nomine*. But if the court should find this to be a tax on income or dividends, upon which, *eo nomine*, citizens pay no tax, yet if the court cannot see that an assessment in this manner is more onerous upon the non-resident than the taxes on citizens, in the manner in which they are imposed, are upon them, the statute should be sustained.

If this statute can be sustained on the ground that it imposes either a tax, excise or duty, the court will assume that it was the intention of the legislature to impose whichever of them should come within their constitutional powers. *Commonwealth v. People's Savings Bank*, 5 Allen, 432. Clearly the legislature might have annexed to the charters of the defendants a provision that a tax should be paid to the Commonwealth upon all stock owned by non-residents. The legislature have reserved the power to alter the charters of all corporations chartered since 1830. This statute may be regarded as an alteration of charters. See *Mass. General Hospital v. State Mut. Ass. Co.* 4 Gray, 234.

All authority of towns or counties to impose taxes is derived from the legislature; and this power might be reassumed by the legislature, and the taxes might be assessed by state officials, collected by state officers, and paid into the state treasury. The state may resume the right which it has delegated to towns and counties. It is also unquestionable that all the property and all interests in property in the state are subjects of taxation in some form. If the power to tax any such property or interests has not been delegated to the towns, then it still exists in and may be exercised by the legislature. And it must follow that an act of the legislature imposing a tax is not rendered invalid by the fact that the tax is imposed only on a portion of the property in the state, provided that by other acts the legislature have imposed or authorized towns to impose a tax upon the other property in the state.

Whether a tax is reasonable is exclusively for the legislature. It is a coördinate branch of the government. No taxes are or can be absolutely proportional. There must be a reasonable approach to equality in taxation. The words "reasonable and proportional" do not limit the power of the legislature or increase the power of the courts. All laws must be just and equal. What is a reasonable approach to equality and proportion is for the legislature. It is sufficient for the courts to ascertain whether the legislature have undertaken to make a fair and just tax. If this has been done, the act must be sustained

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unless they have adopted some principle of taxation which is erroneous or manifestly unjust.

The fact that the stockholders intended to be reached live out of the Commonwealth is no ground of objection to the tax. Their persons cannot be reached. But the legislature might have laid the tax, and made it a lien on the shares, as in case of taxes on real estate.

*F. C. Loring & J. Lathrop*, for the Washington Mills.

*B. F. Thomas*, for the Webster Bank and Firemen's Insurance Company.

*S. Bartlett*, for the Boott Cotton Mills.

BIGELOW, C. J. No question has been made in these cases as to the form of the actions or as to the right of the plaintiff to recover the sums of money demanded of the several defendants, if it shall be held that the tax or excise established by St. 1863, c. 236, is legal and valid. By that statute it was provided that every corporation organized under a charter or under general statutes should reserve from each dividend one fifteenth part of that portion thereof which was due and payable to its stockholders residing out of the Commonwealth, and should pay the same as a tax or excise on such estate or commodity to the treasurer of the Commonwealth. The right of the legislature to impose this tax or excise is the real and only subject of controversy in these actions.

It is by no means certain, on the phraseology of the statute, whether the legislature intended by its provisions to impose a tax or to lay an excise. In the title of the act it is called "a tax on the stock"; in the body of the statute it is denominated "a tax or excise on such estate or commodity." Probably the real purpose was to frame an act to raise a revenue out of certain specified property, by putting it in such shape that it might be held valid either as a tax or an excise, whichever it might be properly called, on a due consideration of the nature of the imposition, the kind or species of property on which it was laid, and the mode in which its payment was to be made and enforced. We shall therefore be more certain of arriving at a result which will cover the whole ground of controversy, and at

the same time leave no room to suppose that the intentions of the framers of the statute have been either overlooked or disregarded, if we consider its provisions in both the aspects which may be taken of their interpretation and meaning.

Before proceeding, however, to determine the question whether the imposition of the tax or excise is valid and within the limit of legislative authority, it is necessary to understand whether it was intended to be laid on the corporations designated in the statute, or upon certain of their stockholders. On this point we cannot entertain any doubt. The purpose of the act in this respect is made manifest from the title. It is declared to be designed "to levy a tax on the stock of corporations held by persons whose residence is out of the Commonwealth." This is equivalent to a declaration that the tax or excise is to be imposed on the property of non-resident stockholders, because the shares in a corporation belong to its stockholders, and not to the corporation. The same intent is clearly shown in the body of the act. The subject of the tax or excise is not the real or personal property of the corporation, nor yet its franchise or corporate power and capacity. The "estate or commodity" which is to be liable to the assessment provided for by the act is that portion of the dividends which may become due and payable to stockholders residing out of the Commonwealth. Such dividends cannot in any just sense be regarded as belonging to the corporation, or as fit subjects of an assessment which is to constitute a corporate charge or burden. It is not until a dividend has been ascertained and declared and made payable to a certain class of stockholders that the subject of taxation or excise contemplated by the statute has any existence. Such dividend is not corporate property. On the contrary, the very act which calls it into being separates it from the property of the corporation, and it thenceforward belongs to the several stockholders, in the proportion in which they own shares in the capital stock. It is from the fund thus created that the tax or excise is to be reserved and paid. It is clearly, therefore, a tax or excise on the income or dividends of stockholders only, and is not intended to be a corporate charge. In order that its payment may be made certain



and convenient, the duty of withholding it from the non-resident stockholders and passing it into the public treasury is imposed on the corporation ; but this is directory and incidental only, and in no way affects the nature or substance of the assessment which it was the design of the legislature to establish. The real purpose of the act was to make the property of non-resident stockholders, invested in shares of incorporated companies within this state, subject to taxation or assessment in the mode prescribed ; it being found difficult if not impracticable to reach such property under the general laws regulating the assessment of taxes. This is made entirely clear by the terms of the proviso which exempts from the excise or tax prescribed by the act stock standing in the name of executors, administrators and trustees, the dividends on which are payable to non-residents, such shares being subject to taxation in the ordinary mode to those persons in whose names the title to the shares stands.

Regarding, then, the tax or excise as imposed on non-resident stockholders, and not on corporations, the main question recurs, whether the statute can be maintained as a valid exercise of legislative power. As has already been intimated, the words "tax" and "excise," although often used as synonymous, are to be considered as having entirely distinct and separate significations, under the provisions of the constitution of Massachusetts, c. 1, § 1, art. 4. The former is a charge apportioned either among the whole people of the state, or those residing within certain districts, municipalities or sections. It is required to be imposed, as we shall more fully explain hereafter, so that, if levied for the public charges of government, it shall be shared according to the estate, real and personal, which each person may possess, or, if raised to defray the cost of some local improvement of a public nature, it shall be borne by those who will receive some special and peculiar benefit or advantage which an expenditure of money for a public object may cause to those on whom the tax is assessed. An excise, on the other hand, is of a different character. It is based on no rule of apportionment or equality whatever. It is a fixed, absolute and direct charge laid on merchandise, products or commodities, without any regard to the

amount of property belonging to those on whom it may fall, or to any supposed relation between money expended for a public object and a special benefit occasioned to those by whom the charge is to be paid. *Portland Bank v. Apthorp*, 12 Mass. 252, 255. *Commonwealth v People's Savings Bank*, 5 Allen, 431.

Bearing in mind this distinction between a tax and an excise under our constitution, it would seem to be very clear that the statute in question cannot be supported as a valid exercise by the legislature of the power of taxation. The requirement of the constitution is that all taxes shall be "proportional." If any force or effect is to be given to this word, it must be regarded as a restriction on the power of the legislative department of the government, and to have been intended to prevent the exercise of an unlimited right to impose taxes. Construed with reference to the context, the meaning of the word is clear and definite. In relation to those expenses which are called in the constitution "the public charges of government," as distinguished from local expenditures or charges incurred for the benefit of a particular section or locality, the design of the framers of the constitution was that these, or a portion thereof, should be defrayed by means of taxation; and that in assessing the needful amount it should be laid on property, real and personal, within the Commonwealth, so that, taking "all the estates lying within the Commonwealth," as one of the elements of proportion, each tax-payer should be obliged to bear only such part of the general burden as the property owned by him bore to the whole sum to be raised. This rule of proportion was based on the obvious and just principle that the benefit which each person derives from the government has direct relation to the amount of property which he possesses and enjoys under its sanction and protection. It was to prevent this essential principle from being violated or disregarded, and to render it certain that taxation for general purposes of government should be made equal, that it was expressly provided in the constitution that a valuation of estates within the Commonwealth should be taken anew decennially at least, and oftener if the legislature should order. Having regard to these explicit provisions of the constitution,

we think it clear beyond dispute that an unlimited discretion on the subject of taxation, especially as to money raised for the public charges of government, was not reposed in the legislature. That the power to impose taxes, either directly, by the immediate officers or agents of the Commonwealth, or by means of authority delegated to towns or cities, is vested in the legislature under the constitution, and that this power extends over every species of property within the Commonwealth as well as over persons resident therein, does not seem to be open to question. Indeed it is conferred in express terms; but the limitation of the power is as express as the delegation of it. While on the one hand the authority is conferred in broad and comprehensive terms, so on the other hand the principle on which it is to be exercised is clearly defined. The contention in the present case is not that the legislature had not full authority to tax the shares of non-resident owners. This is conceded. But the controversy is as to the method in which the power has been exercised, and whether the statute has not prescribed a rule of taxation which cannot be carried into effect without exceeding the limitation imposed by the constitution on that power.

No attempt has been made in the arguments, both oral and written, submitted by the attorney general to show that the tax in question, which is a tax imposed for no local object of a public nature but to defray general public charges, is in any just sense proportional. Nor can we see any ground on which it can be plausibly contended that it is so. It is imposed as an absolute fixed tax on certain property belonging to a designated class of persons, without any reference to the elements of proportion which usually and properly enter into and form the basis of assessments for public charges. The imposition of the tax is not affected nor the amount of the exaction varied, either by the fluctuations of the public charges or by the valuation of all the property which is liable to assessment. The rule of taxation is permanent and inflexible, and is to be uniformly applied without any reference to the amount of money to be raised for the general purposes of government, or the sum which is to be assessed on other kinds of property, or the value of all the property in

the Commonwealth which is subject to taxation. It is clearly impossible that a tax of a fixed sum on a particular subject of taxation, which is not graduated either according to the whole sum required to be raised for public objects or by the value and amount of the entire property to be assessed, can be based on any element of proportion or have any relation to other taxes which rise or fall according to the amount to be raised and the value of the property on which they are to be paid. There can be no proportion between that which is fixed and that which is uncertain and fluctuating. It seems to us, therefore, that we cannot uphold the tax in controversy as being within the constitutional authority of the legislature unless we are prepared to say that there is no limitation imposed by the constitution on the discretion of the legislature in the exercise of the power of taxation for general purposes, and that such a tax on one class of persons and property is legal and valid which is not only different in kind from that imposed on all other persons and kinds of property, but which is imposed without any regard to proportion as an element on which it is to be calculated. But this proposition cannot be maintained, for the obvious reason that the power of taxation granted to the legislature for general purposes is expressly limited by the constitution to the imposition of proportional taxes "upon all the inhabitants of, and persons resident and estates lying within, the said commonwealth." To support the assessments in controversy as a rightful exercise of legislative authority, it would be necessary to disregard this clear and explicit constitutional provision. The statute authorizes a tax to be imposed on property without regard to any rule of proportion whatever. It is apparent, therefore, that in enacting it the legislature have adopted an erroneous and unconstitutional basis or principle of taxation.

But it is urged that these words, which seem to limit and restrain the authority of the legislature in the matter of taxation, were not intended to be obligatory in such sense as to render an observance of them essential to the validity of legislative enactments; but that they were designed as directory only, indicating a rule which was to be binding on the

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conscience of legislators and to guide their action, but which was not of the essence of the authority delegated to them by the constitution. On mature consideration, we are of opinion that this argument would lead to conclusions dangerous in their consequences and inconsistent with the fundamental principles on which the frame of government rests. Nor can we see any good reason for applying such a rule of interpretation to this part of the constitution. Words and phrases will be held to be directory only when it is clear that the intent was to use them in such a sense, or when a different construction would be attended with unreasonable, absurd or incongruous results. It certainly would be contrary to the ordinary rule of interpretation to say that a grant of power to which qualifying and restrictive words are annexed is nevertheless absolute and unlimited, and that the grantee is to regard them merely as advisory or monitor, and may exercise a power wholly irrespective of them and without limitation, if he sees fit so to do. Not only do we fail to see any ground for the belief that the words in question were intended to be used in the constitution in any peculiar or qualified sense, or were designed to have any other effect than that which would result from the ordinary rule of interpretation, but it appears to us that there is cogent reason for the inference that they were inserted as a restraint on the legislative power of taxation. In a constitution, the great purpose of which was to define and limit the powers of government, it cannot be supposed that the power to lay and assess taxes would be granted to the legislature without any obligatory restraint on its exercise. No power is capable of greater abuse or can be made more oppressive and odious in practice. Of this the framers of the constitution and their contemporaries had had abundant experience and knowledge. Nor can we doubt that by the use of words in the constitution, the natural import of which is to put a limit on the exercise of this power, they intended them to have that operation and meaning. If this be not so, then it would follow that all estates and property within the Commonwealth would be subject to any tax which the legislature might impose, however unreasonable and unproportional it might be. No recourse

could be had to the judiciary for redress, because courts could put no restraint on the exercise of a power which had no limit except in the discretion of the body in which it was vested. We cannot come to the conclusion that any such irresponsible power of taxation is lodged with the legislature under our constitution, more especially as we find words the natural and proper construction and effect of which are to put a just and wise restraint upon its exercise. Such was the view which was taken of this clause of the constitution in the early case of *Portland Bank v. Apthorp*, already cited. It was there distinctly declared by the court that a tax to be constitutional must be proportional. Undoubtedly great latitude of discretion is given to the legislature within the limits prescribed for the exercise of the power of taxation. A tax would not be declared illegal and void, as being unreasonable, unless it was plainly and grossly oppressive and unequal, or contrary to common right; nor would it be held to be unproportional unless it violated clearly and palpably the rules of proportion which could be properly applicable to the subject matter of a tax. But when, as in the case at bar, a tax is assessed on no rule of proportion, but is laid arbitrarily at a certain fixed amount on one species of property, as respects its ownership, without any regard to other elements which ought to enter into the basis of taxation, then it is clearly unconstitutional and void.

It only remains for us to consider whether the assessments laid on the defendants can be supported as a valid exercise of the power to impose excises. Assuming that a dividend may be deemed to be a commodity or production, and so be considered as coming within the class of subjects on which an excise may be properly laid — a point by no means clear — still there are insuperable difficulties in the way of sustaining the assessment authorized by the statute. In the first place, it is grossly unequal, and does not operate alike on all persons whose property is made subject to it. It was declared by this court in *Portland Bank v. Apthorp*, *ubi supra*, that “taxes of this sort must undoubtedly be equal;” that is, must operate alike on all persons who exercise a particular employment or enjoy the same

privilege or commodity. The same doctrine was affirmed in the recent case of *Commonwealth v. People's Savings Bank*, *ubi supra*. The reason is obvious. In the language of the court, an unequal excise would be "contrary to the principles of justice." That the excise in question operates unequally in this sense cannot be doubted. It is laid only on a certain class of stockholders, those residing out of the state, leaving all others who enjoy the same privilege and receive a like profit or gain entirely exempt from any similar charge. This is not the only inequality. Shareholders in one class of corporations, who are resident in other states, are subjected to a rate of assessment higher than the same class of shareholders in other corporations. In manufacturing corporations the profits out of which dividends are declared are diminished by a tax imposed under the general tax act on the machinery belonging to the corporation. To the extent of his share or proportion of this tax each foreign shareholder in effect is subject to it and pays the amount thereof out of his dividend, in addition to the excise thereon. But corporations which are established for purposes other than the carrying on of the trade or business of manufacturing are subject to no such tax on their personal property as that imposed on machinery; so that shareholders in those corporations in fact pay the excise only. The result is that the excise is not only imposed on dividends due to one class of stockholders and not on those due to another class in the same corporation, but a higher rate of excise is paid by non-resident stockholders in one class of corporations than by foreign stockholders in all other corporations.

These inequalities, however, are not the only objections to the validity of the excise. We are unable to see how it can be supported consistently with that provision of the constitution of the United States which secures to the citizens of each state all the privileges and immunities of citizens of the several states. Art. 4, § 2. This clause of the constitution was doubtless taken and condensed from art. 4, § 1, of the articles of confederation and perpetual union, adopted by congress July 9th 1778, and which formed the basis of a national government for the United

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States prior to the adoption of the constitution. It was thereby provided that the "people of each state should enjoy in any other state all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively." The object of substituting the constitution for the articles of confederation was to make a more perfect Union. One of the most efficient methods of effecting this purpose was to vest in the general government the power to regulate not only foreign trade and commerce, but also that between the different states of the Union, and to secure an equality of rights, privileges and immunities in each state for the citizens of all the states. It is obvious that the power of a state to impose different and greater burdens or impositions on the property of citizens of other states than on the same property belonging to its own subjects would directly conflict with this constitutional provision. By exempting its own citizens from a tax or excise to which citizens of other states were subject, the former would enjoy an immunity of which the latter would be deprived. Such has been the judicial interpretation of this clause of the constitution by courts of justice in which the question has arisen. *Corfield v. Coryell*, 4 Wash. C. C. 380, 381. *Campbell v. Morris*, 3 Har. & McHen. 535, 554. *Crandall v. State*, 10 Conn. 343.

But it is suggested that it is not made to appear that the effect of this assessment on stockholders residing in other states is to impose a greater burden on them than on citizens of this state. But the suggestion, though specious and plausible, does not seem to us to answer the objection. The excise is in terms confined to stockholders residing out of the state. No such assessment is laid on the citizens of this state. It is a burden wholly different in kind from any which is borne by the resident stockholders. *Prima facie*, then, a discrimination is made in favor of our own citizens. This inference is not controlled or overcome by the suggestion that shareholders residing in this state are subject to taxation on the value of their shares under the general laws regulating the assessment of taxes, but that the shares of non-resident shareholders are not liable to be



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assessed in the ordinary mode. The fact is so certainly. But the reason is that shares in corporations, being personal property, follow the person, and are taxable to the owner in the state where he has his domicile. It cannot be assumed that they are exempt from taxation, or that they are not liable to it, as having a rate of assessment in the place of residence of the owner, as the shares of resident stockholders are subject to it here. Besides; we can see no mode of working out an equation by which an excise of the nature prescribed by the statute can be shown to have any proportion to the tax on the shares belonging to citizens of this commonwealth.

In the supplemental brief submitted by the attorney general, it is urged that the statute may be supported as an exercise of the right to amend the charters of corporations which is reserved to the legislature. But we see no reason to believe that such is the effect of the statute, or that it was so intended by the legislature. The statute in that respect interprets itself. It is an act to lay an excise or tax on certain stockholders. It is not a tax on the corporation or its franchise, as has been already stated, nor are corporations made liable to pay out of their corporate funds any tax, excise or duty on the shares of non-resident stockholders. If such had been the provision of the statute a very different question would have arisen. But it is a tax or excise laid on the property of each stockholder, after the dividend has been ascertained and declared and become due and payable from the corporation to him. The corporation is only made the agent to pay the tax in behalf of the stockholders. We cannot regard these provisions, so far as they affect the rights of the stockholders only, to be amendatory of the charters.

*Judgment for the defendants.*

**HENRY K. OLIVER vs. COLONIAL GOLD COMPANY.**

**SAME vs. HALIFAX GOLD MINING COMPANY.**

**SAME vs. GILBERT RIVER GOLD MINING COMPANY.**

If an action to recover a tax upon a corporation, assessed under St. 1864, c. 208, is brought by the treasurer of the Commonwealth in his own name, instead of in the name of the Commonwealth, as required by § 14 of that statute, and the declaration contains no averment that the treasurer was by law authorized to commence the action in his own name, the defendants may take advantage of the objection, and defeat the action, although no demurrer to the declaration is filed, and the answer contains neither a special nor a general denial of the averments of the declaration.

THREE actions of contract brought by the treasurer of the Commonwealth to recover taxes assessed under St. 1864, c. 208, upon corporations. The writs were all dated September 19th 1864.

The declaration in the first action alleged that the defendants were a company organized under the general laws of the Commonwealth; that by St. 1864, c. 208, they became liable to pay a tax of seven twelfths of one per cent. upon the cash market value, on the 1st of May 1864, of all its capital stock, as determined by the treasurer and auditor of the Commonwealth; that said treasurer and auditor on the first Monday of June 1864 determined that the cash market value was \$118,000, and thereupon assessed a tax of seven twelfths of one per cent. on said amount, being \$688.33; that immediately thereafter, and before the first Monday of July 1864, they caused the defendants to be notified thereof, and the defendants thereupon became bound to pay said sum to the plaintiff; yet, though requested, have refused so to do.

The declarations in the other two actions were similar to the foregoing, except in respect to the amounts.

The answer, in the first action, alleged simply that the books of the defendants were not opened or their stock issued on the 1st of May 1864, and that their stock had no market value on that day

The answers in the second and third actions simply denied

that the defendants owed the plaintiff the sum set forth in the declaration.

At the trial of the *first* action, in the superior court, before *Brigham, J.*, neither party offered any evidence, but the defendants objected that the action could not be maintained in the name of the plaintiff, but that it should have been in the name of the Commonwealth; and that the declaration was defective in not alleging that the defendants were a coal or mining company. The judge overruled these objections, and instructed the jury that upon the pleadings the plaintiff was entitled to recover, and a verdict was rendered accordingly. The defendants alleged exceptions.

At the trial of the *second* action, in the superior court, before the same judge, neither party offered any evidence, but the defendants objected that no cause of action existed in the plaintiff on the facts alleged; but the judge overruled the objection, and directed a verdict for the plaintiff, which was accordingly rendered. The defendants alleged exceptions.

In the *third* action, it was agreed, in the superior court, that the plaintiff was entitled to judgment unless upon the pleadings the objection was open that the action should have been brought in the name of the Commonwealth, and unless certain other facts, not now material, would defeat it. Judgment was ordered for the defendants, and the plaintiff appealed to this court.

*A. F. L. Norris*, for the Colonial Gold Company.

*L. A. Jones*, for the Halifax Gold Mining Company and Gilbert River Gold Mining Company.

*Reed, A. G.*, for the Commonwealth.

*CHAPMAN, J.* These actions are brought to recover the amount of a tax due to the Commonwealth under *St. 1864, c. 208*. It was necessary for the plaintiff to state in his declaration such substantive facts as would, if proved, entitle him to recover. If he neglected to do this, the defendants might for some defects answer in abatement, and for others they might demur to the declaration, on the ground that it did not set forth a legal cause of action, stating the particulars in which the defect consisted. *Gen. Sts. c. 129, §§ 11, 12*. Or the court might, either

on motion of the defendants or on its own motion, order the plaintiff to file a statement of such further particulars as might be necessary for the further information of the defendants or the court. § 58.

But a defendant is not bound to demur to a declaration, or to ask for a further statement of particulars, and if he files an answer and goes to trial the court will not set aside a verdict against him on account of any defects in the declaration. In the report of the commissioners who framed our system of pleading and practice, they say: "Allegations are made that the parties may have notice; but if both parties were content to act upon what they had, why should either be allowed to complain afterwards?"

In the first of these cases, the defendants merely filed an answer in which they made no denials, but averred certain substantive facts in defence. Upon these pleadings the parties went to trial before a jury. As the plaintiff's allegations had not been denied, the court and jury were to regard them as admitted to be true. The plaintiff relied on them, and offered no further evidence. If these allegations were sufficient to maintain the action, the plaintiff was entitled to a verdict, unless the defendants should establish a defence. The defendants offered no evidence, but objected that the facts stated in the declaration and not denied were insufficient to maintain the action. This state of the case made it necessary for the court to instruct the jury on that subject. The declaration did not state that the defendants were a mining company, or that the plaintiff was authorized by law to bring the action in his own name, and therefore neither of these facts appeared. But both were necessary to maintain the action. The statute, of which the court must take judicial notice, requires that the action shall be brought in the name of the Commonwealth, and it was mining companies that were made subject to the tax. The jury ought therefore to have been instructed to find a verdict for the defendants, and the instruction to find a verdict for the plaintiff was erroneous.

In the second case, the defendants filed an answer merely

denying that they owed the plaintiff the sum stated in his declaration. This is merely a denial of a legal conclusion, and is equivalent to the general issue, which the practice act abolished. *Granger v. Ilsley*, 2 Gray, 521. *Van Buren v. Swan*, 4 Allen, 380. But the plaintiff did not demur to the answer, nor file any motion in respect to it, and the court suffered the cause to go to trial without making any order as to the answer. After verdict, it is to be assumed that both the court and the parties were sufficiently informed of the nature of the case to be tried. The parties went to trial upon the allegations in the declaration which, not being denied, were admitted to be true, and no evidence was offered. In these cases the jury should have been instructed that the facts alleged and admitted did not show that the plaintiff was authorized to maintain the action for the tax in his own name, and the instructions given were erroneous. The plaintiff contends that he was entitled to a verdict as upon *nil dicit*, but no such question is open here; the exceptions presented to us relate merely to the instructions given to the jury.

The case of *Gray v. Paxton*, reported in Quincy, 541, is quite in point. That was an action brought by the treasurer of the Province of Massachusetts Bay to recover a tax assessed by the Province. The defendant set up, by a plea in abatement, the same defence that is made so inartificially in these cases, namely, that the action should be in the name of the Province, and not in the name of the treasurer. The plea was overruled in the inferior court, but upon appeal to the superior court it was sustained, and at August term 1761 judgment was entered that the writ abate.

The third case comes before us upon an agreed statement of facts, in which there is nothing stated to aid the declaration. Upon the defects of the declaration, therefore, the defendants are entitled to judgment; for the declaration refers to the tax act, and thus shows that the action should have been brought in the name of the Commonwealth, and not in the name of the treasurer.

*Exceptions sustained in the first and second cases. Judgment for the defendants in the third case.*

**UNION RAILWAY COMPANY vs. MAYOR AND ALDERMEN OF THE  
CITY OF CAMBRIDGE & another.**

The power of making regulations concerning the removal of snow from the tracks of street railways is given by law exclusively to the mayor and aldermen of the cities, and the selectmen of the towns, in which such tracks are located; and in the exercise of this power they may prohibit the removal of snow by the railway company at any and all times and places when in their judgment the public interests involved may require it.

It is no objection to an order of the mayor and aldermen of a city regulating the removal of snow from the track of a street railway, that it requires and permits such removal by the railway company only when it is allowed, and in a manner to be designated, by the superintendent of streets, or other officer having charge of the condition or repair of streets.

**BILL IN EQUITY** by a street railway company, setting forth that by *St. 1853, c. 383*, the Cambridge Railroad Company were incorporated for the purpose of constructing and using a street railway in the streets of Cambridge and Boston where their tracks might be located; that by *St. 1855, c. 338*, the plaintiffs were incorporated for the purpose of hiring said Cambridge Railroad; that the plaintiffs accordingly hired the same; that at the date of the lease the Cambridge Railroad Company had procured locations and constructed tracks running from Bowdoin Square in Boston to Harvard Square in Cambridge, and to Mount Auburn and North Cambridge; that the plaintiffs commenced and have since continued to run trips with their cars regularly, and have been in the habit of removing snow in the winter season from their track by means of snow-ploughs, and levelling down the snow or removing the surplus snow from the streets when required, so that the portion of the public using the streets with sleighs might be accommodated upon the sides of the tracks, while that portion of the public using the cars were also accommodated; that from this course no serious inconvenience has resulted; that by *St. 1864, c. 229*, concerning street railway corporations, the board of aldermen of any city in which a street railway is operated are authorized to establish by an order such rules and regulations as to the rate of speed, mode of use of the tracks, and removal of snow and ice from the same, as in their judgment the interest and convenience of the public require;

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that the plaintiffs requested the board of aldermen of Cambridge to establish such rules and regulations, and thereupon the board of aldermen passed the following order :

“ In Board of Aldermen, December 21, 1864. *Ordered*, That the Union Railway Company be and is hereby prohibited from removing snow or ice from their tracks in any of the streets or upon any of the bridges of the city, unless said company shall have first obtained the consent of the superintendent of streets and drains therefor, which consent said superintendent is hereby authorized to give, when in his judgment the same shall be proper ; and, whenever such consent shall have been given, the snow and ice shall be removed in the manner and to the degree directed by said superintendent, and not otherwise. And the superintendent of streets and drains is hereby authorized, under the direction of the committee of roads and bridges of this board to contract with the railway company for the removal of ice and snow, and for the purpose to employ the men and teams belonging to the street department. *Ordered*, That all orders in relation to the removal of snow and ice inconsistent with the foregoing order be and the same are hereby rescinded.”

The bill further set forth that on the day after the passage of the above order the superintendent of streets and drains of Cambridge refused to give his consent to the removal of the snow and ice from the plaintiffs' tracks, and forbade and prohibited the plaintiffs and forcibly restrained them and their agents from so removing the snow and ice, whereby the plaintiffs were prevented from using that portion of their track, to the great inconvenience and damage of themselves and of the public.

The plaintiffs afterwards filed a supplemental bill, setting forth that on the 22d of March 1865 the board of aldermen passed the following order : “ *Ordered*, That the removal of snow and ice from the tracks of the Cambridge Railroad Company between Harvard Square and the dividing line between Cambridge and Boston be and the same is hereby forbidden ; ” and that the defendants threaten to prevent the plaintiffs from removing the snow and ice from their tracks.

The prayer was for an injunction, and for further relief. The

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defendants filed a general demurrer, and the case was reserved for the determination of the whole court.

*B. R. Curtis & C. T. Russell*, for the defendants, cited *Sts.* 1864, c. 229; 1853, c. 383; Gen. Sts. c. 44, §§ 1, 8, 22, 24; c. 18, §§ 75, 76; *Buffalo, &c., Railroad v. Buffalo*, 5 Hill, 209; *Roxbury v. Boston & Providence Railroad*, 6 Cush. 429; *Commonwealth v. Temple*, 14 Gray, 69; *Springfield v. Connecticut River Railroad*, 4 Cush. 63; *Commonwealth v. Nashua & Lowell Railroad*, 2 Gray. 56; *Commonwealth v. Vermont & Massachusetts Railroad*, 4 Gray, 22.

*H. W. Paine & G. G. Hubbard*, for the plaintiffs. The plaintiffs acquired, under the charters referred to, the franchise to construct and use a street railway, and to transport passengers at all seasons of the year by cars. *Commonwealth v. Temple*, 14 Gray, 69. *People v. Kerr*, 27 N. Y. 188; S. C. 37 Barb. 357. If they have the right to use their track, they must have all the power necessary to make that use available. The defendants, as surveyors of highways, have no authority over the tracks of street railways. By *St.* 1864, c. 229, § 18, the plaintiffs are bound to keep the streets in repair for a space including eighteen inches in width on each side of their track. The city, therefore, under Gen. Sts. c. 44, § 1, are exonerated from duty and liability as to so much of the highway. *Vinal v. Dorchester*, 7 Gray, 421. *Sawyer v. Northfield*, 7 Cush. 490. *Springfield v. Connecticut River Railroad*, 4 Cush. 63. Nor have the defendants any such power under the statutes concerning street railways. Under these statutes, the defendants act simply as a body of men on whom certain duties of a ministerial or quasi judicial nature are devolved. *Cambridge v. Cambridge Railroad*, 10 Allen, 50. *Young v. Yarmouth*, 9 Gray, 386. *Vinal v. Dorchester*, above cited. *Sts.* 1855, c. 338, §§ 2, 3, 8, 9; 1864, c. 229, §§ 14-22, 34. The only authority on which this exercise of power can be based is that allowing the defendants from time to time to establish rules and regulations as to the rate of speed, mode of use of the tracks, and removal of snow and ice from the same. *St.* 1864, c. 229, § 16. Under this section they have just the same authority to regulate the rate of speed that they have to remove



snow and ice. Now can it be contended that under this section the defendants may pass an order prohibiting any motion of the cars, or leaving it to a third person to say when they may move? With a view to regulate speed can they say that the cars shall not run at all; or shall not run through the summer months because they raise a dust? If not, how can it be said that they may prohibit altogether the removal of snow and ice, and say that the same shall not be removed unless by consent of a third person?

These orders are unreasonable. The plaintiffs are bound to maintain a portion of the street in repair, and are liable for accidents. But they are enjoined from doing the very thing that would relieve them from this liability. They are bound to furnish accommodations for passengers. But how are they to do this if there is a snow-drift on the track? The language should be very explicit in order to involve such a result as is contended for. Here, the power which is given is to regulate; and the defendants assume authority to prevent. *Austin v. Murray*, 16 Pick. 121. *Commonwealth v. Stodder*, 2 Cush. 562.

Referring the plaintiffs to a third person for his consent cannot in any sense be considered as the establishment of a rule. This reference might as well be to anybody else as to the superintendent of streets.

HOAR, J. This case comes before us upon demurrer to the bill and supplemental bill of the plaintiffs, and presents the question whether the orders of the aldermen of the city of Cambridge, passed on the 21st of December 1864, and the 22d of March 1865, are valid and authorized by law; or are in violation of the franchise of the Union Railway Company. As the former order has been repealed, so far as it relates to the tracks mentioned in the second order, the chief question of present practical importance is the validity of the latter.

The order of the 22d of March absolutely forbids the removal of snow and ice from the tracks of the Cambridge Railroad Company, the road leased and used by the Union Railway Company, between Harvard Square in Cambridge and the dividing line between Cambridge and Boston.

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The plaintiffs allege that they have by their charter, and that of the Cambridge Railroad Company whose road they lease, a franchise to lay down upon the surface of the public streets a railway, and to run upon the tracks of such railway cars for the transportation of passengers at all seasons of the year; that having the right to use the tracks with cars, they have, as incident thereto, a right to do whatever is necessary to make the use available, and therefore the right to remove the obstructions of snow and ice which may impede or wholly stop the running of the cars.

The defendants chiefly rely upon the authority vested in them under *St.* 1864, c. 229, § 16; which provides that "the board of aldermen of any city, or the selectmen of any town, in which a street railway is operated, may from time to time establish by an order such rules and regulations as to the rate of speed, mode of use of the tracks, and removal of snow and ice from the same, as in their judgment the interest and convenience of the public may require." Does this section authorize the passage of an order entirely prohibiting the removal of snow and ice by the railway company from any part or the whole of its road, and thereby suspending for a time the possibility of running its cars upon the rails?

The *St.* of 1864, entitled "An Act concerning Street Railway Corporations," seems to have been a revision and digest of all the previous legislation on the subject; and, in construing any one of its numerous provisions, it is proper to regard the whole scope and design of the enactment, and the nature of the subject matter to which it applies.

The establishment of street railways was originally an experiment, for the purpose of accommodating the public travel with a cheap and convenient mode of transportation through the streets of towns and cities, which it was supposed would be found compatible with the continued use of the streets for ordinary purposes. They have been found to be of great public benefit; and have now been in use long enough to afford an opportunity for the legislature to determine, in the light of experience, the extent and nature of the privileges which could be

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intrusted to the railway companies, and to make their powers and duties to some extent the subject of judicial construction. And it will be found that the legislature have adhered with great uniformity to the policy which was adopted from the outset, of making these corporations subject in a great degree to the direction and control of the board of aldermen of the cities, and the selectmen of the towns, in which their franchise is to be exercised. This control is given to these municipal officers, not as representing a conflicting interest, but as independent bodies, charged with the duty of protecting the rights and promoting the convenience of the whole public. *Cambridge v. Cambridge Railroad*, 10 Allen, 57, 58.

That part of the community who use the street cars have the same voice in choosing the aldermen or selectmen, and the same opportunity to influence their judgment, with those who use the streets in other ways. It is obvious that at particular times, and under some circumstances, the right to use the streets with horse cars, and with other vehicles, may conflict with each other. One or the other must yield; and some tribunal must determine which it shall be. In such cases the general convenience must govern.

By the *St.* of 1864, the board of aldermen of cities, and the selectmen of towns, in which street railroads are authorized by law, are in the first place to "locate" the tracks, or such of them as in their judgment the public convenience may require; and may afterward alter the location and position of any tracks. After one year from the opening of the railway for use, they may revoke the location of any tracks, and require the street to be restored to its previous condition. They may order the railway company to discontinue temporarily the use of any tracks, whenever they adjudge that the safety or convenience of the inhabitants requires such discontinuance. Towns and cities may take up the streets in which street railways are "located," and discontinue them, as other streets, without liability to the railway companies for damages.

It is in connection with these broad and comprehensive provisions that we are to consider the power of the defendants "to

make such regulations as to the removal of snow and ice from the tracks as in their judgment the interest and convenience of the public may require." And whether in their judgment it will be for the interest and convenience of the public, giving due consideration to those who use the cars, as well as to all others, that the snow and ice shall be removed by the railway company, or under the direction of the officer having the general charge of the streets, or that it shall be left to the operation of the sun and rain, we think is in each case left wholly to their decision. Whether in any street, having regard to its width, its exposure, and the position of the tracks, it will be practicable to remove the snow to such an extent as to make it passable for the cars without an unreasonable interference with other uses, we cannot determine, and we do not think the legislature meant to determine. If the prohibition to remove the snow occasions the temporary disuse of the tracks, the consequence is no more than is included in a power expressly given.

The reasoning by which the plaintiffs support their claim is very forcible, and would be sound if their franchise were an absolute, instead of an extremely limited and qualified one. Their use of their tracks is necessarily to some extent exclusive, and modifies the right of other persons in travelling. But the use of the whole street is granted to them only in common with others. The snow and ice, which it may be desirable or necessary for their purposes to remove, it may be very important for the convenience of other travellers to retain. The preponderance of public convenience should govern. The power and the duty of deciding which course is advisable are vested by law in the defendants, and we cannot suppose their decision will be made without good reason.

An argument has been pressed upon our attention, derived from the connection in which the power to regulate the removal of snow is found, namely, in the same section which provides for regulating the rate of speed of cars, and the mode of use of tracks; and it is said that in neither case can the power to regulate include the power to prohibit. But it is by no means clear that the right to regulate the mode of the use of the tracks

would not justify a regulation that certain tracks, or those in certain streets, should not be used when there is snow on the ground which would require removal to make the tracks available. And further, while the tracks and the cars are the property of the companies, the snow is not their snow. It comes without their consent or procurement, and its removal is not a necessary part of their franchise. Removing it from the railway tracks might in some cases make the street impassable for ordinary travel, unless great expense and trouble were incurred to remove it from the whole surface. From the nature of the subject, it seems to us that the power of regulation must include the power of partial, and sometimes of total, prohibition.

The only distinct objection made to the order of December 21st 1864, which is not applicable to the order of March 22d 1865, is, that it prohibited the removal of snow and ice without first obtaining the consent of the superintendent of streets; and that the board of aldermen could not delegate their power to another officer. This objection we do not think substantial. The board of aldermen, in passing their order, first create the power, and act in a *quasi* legislative capacity. The nature of the duty is such that it would be difficult to fix beforehand by definite rules the mode and extent of the removal of snow. The exigency is sometimes pressing, not admitting a new order of the board for particular occasions; and the work to be done may be as various as the form and size of snowdrifts. It is a sufficient compliance with the intent of the statute to intrust the execution of the work to the officer having general charge of the condition of the streets; and is in entire analogy with the other provision, which requires the repairs of streets by the railway companies to be made by them "to the satisfaction of the superintendent of streets, the street commissioner or the surveyors of highways."

Being of the opinion, therefore, that it was competent for the defendants to pass either of the orders complained of, the demurrer must be sustained, and the

*Bill dismissed, with costs.*

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Darling v. Boston and Worcester Railroad Corporation.

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CHARLES B. DARLING *vs.* BOSTON AND WORCESTER RAILROAD  
CORPORATION.

If an arrangement is made between several connecting railroad companies, by which goods to be carried over the whole route shall be delivered by each to the next succeeding company, and each company so receiving them shall pay to its predecessor the amount already due for the carriage, and the last one collect the whole from the consignee, a reception of such goods by the last company, and a payment by it of the charges of its predecessors, will not render it liable for an injury done to the goods before it received them.

CHAPMAN, J.\* The defendants are sued as common carriers, for an injury done to certain goods which were carried by them. The goods were taken by the Michigan Central Railroad and brought over that and several intermediate roads to the defendants, and were then brought by the defendants over their road and delivered to the plaintiff in Boston. There was no evidence tending to show that they were injured on the defendants' road; and the plaintiff contends that the defendants are liable if the injury was caused by the negligence of any of the roads on the route.

The law as to the liability of carriers of goods for injuries done to the goods through their negligence is in most respects the same, whether the carriage is by railroads, stages, canal boats, river craft or sea-going vessels, and is also similar to the law as to carriers of passengers and their luggage; and authorities as to all these various species of carriage are usually cited almost indiscriminately.

In the absence of any usage or special contract, a carrier is bound to carry goods only upon his own route, and then deliver them to the consignee designated by his employer. If there is a usage or contract by which he is to deliver them to another carrier to be transported further, he discharges his duty by delivering them in good order and with proper instructions to that carrier. Such a usage may be proved in order to show what his duty is. *Garside v. Proprietors of Trent & Mersey Navigation*, 4 T. R. 581. *Hyde v. The Navigation Co.* 5 T. R. 389. *Van*

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\* COLT, J. did not sit in this case

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*Santvoord v. St. John*, 6 Hill, 157. *Farmers & Mechanics' Bank v. Champlain Transportation Co.* 23 Verm. 209. The usage as to the manner of doing the business enters into the contract as part of it, in the absence of an express contract.

But the convenience of commerce makes it highly useful to send goods to distant places which can be reached only by several connecting but independent lines of transportation. It is important that this business should be accommodated; and this may be done either by express agreement or established usage. It is frequently done in this country by express arrangement made by the proprietors of connecting lines with each other, and "this is much better than to leave any important matter of this kind to be settled by proof of mere usage. When such arrangements are made, the liability of each line is to be determined by a fair construction of their terms. Such an interpretation is not only required by legal principles, but by considerations of expediency. If each line of carriers is not held responsible according to its contract, injustice is done to its customers, and the business of the public is not properly protected. If it is held responsible beyond this, it is not properly protected, and cannot afford to continue its business without changing its arrangements. And in construing its agreements, express or implied, all that is necessary is that they shall be reasonably clear. The *dictum* that they must be "exceedingly clear" is not reasonable.

Sometimes the arrangements of adjoining routes have been held to constitute a partnership; as where they have put their earnings into a common fund, and divided it according to the length of their respective lines, under such an agreement as appeared in the case of *Champion v. Bostwick*, 18 Wend. 175. Or if they have jointly employed an agent, though they were not partners in other respects, they have been held jointly liable for his misfeasance. *Cobb v. Abbot*, 14 Pick. 289.

Or they may transport goods without becoming partners or incurring any joint liability. Where a carrier takes goods that are to be carried to a distant point beyond his line, and must pass over several intermediate lines, his employer finds it necessary to make some arrangement for the payment of freight and

the transportation of the goods over each line. For none of the intermediate carriers are bound to transport the goods till they are paid for it, nor are they bound to deliver them to the next carrier without directions, express or implied. The carrier may become liable to his employer for transporting them over every line to the place of their destination. *Najac v. Boston & Lowell Railroad*, 7 Allen, 329. The English courts have held that the first carrier is thus liable unless he makes an express limitation of his liability. But this position has not been sustained in this country. *Farmers & Mechanics' Bank v. Champlain Transportation Co.*, *ubi supra*. *Nutting v. Conn. River Railroad*, 1 Gray, 502. But it would be inconvenient and expensive to the owner of the goods to make an express arrangement with each of the intermediate lines, and to make direct payment of the freight to each of them. The connecting lines can easily save him this trouble and expense by an arrangement between themselves. Whether or not such arrangement will make the several carriers jointly liable or each liable for the whole, or limit the liability of each to its own defaults, must depend upon the terms of the arrangement. Courts have had frequent occasion to give a construction to such arrangements. In *Fitchburg & Worcester Railroad v. Hanna*, 6 Gray, 539, the arrangement of the plaintiffs was with another railroad and a steamboat company to and from New York. It appeared that, in receiving goods at New York to be carried over the plaintiffs' line, the steamboat company acted as the plaintiffs' agent. It followed, of course, that the plaintiffs could collect the whole freight, but were liable for damage done to the goods by the negligence of the steamboat company; and it was so held. But without such agency it would have been otherwise.

One of the methods adopted is, that the carrier takes the goods from the consignor upon an agreement to transport them over his own line and deliver them to the next line. In such case he acts as carrier and forwarding agent. *Nutting v. Connecticut River Railroad*, 1 Gray, 502. *Briggs v. Boston & Lowell Railroad*, 6 Allen, 246. *Judson v. Western Railroad*, 4 Allen, 520. If he receives the whole freight money in advance, yet



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limits his liability as carrier to his own line, he deducts the part due him, and acts as agent of the owner in paying over the residue to the next carrier. The owner thus contracts directly with the next carrier through the agency of the first carrier. But payment of freight in advance is generally inconvenient, and as the goods are presumed to be of sufficient value to pay the freight, an arrangement is sometimes made by which each carrier subsequent to the first pays what is due when the goods are delivered to him, and the last carrier collects the whole bill of the consignee. Such an arrangement creates no partnership or joint liability. If a further arrangement is made between the carriers that the freight bills shall not be paid on the receipt of each parcel of goods, but an account shall be kept for each line upon a particular route, and periodically settled, this will not create a partnership or joint liability, for each line charges separately for its own freight. If it is further arranged that each line shall charge only a stipulated rate of freight, so that any customer can be informed beforehand what the amount of freight will be to a given place of destination, this does not create a partnership or joint liability.

Arrangements of this character are convenient to the public, because they enable carriers to transport goods at low rates. They are inconvenient in some respects. They render it difficult to obtain compensation for injuries to goods, because it is difficult for the owner to prove where an injury was done, and, if he can prove it, he may be obliged to carry on a litigation in a distant state. But if the law is adhered to, and contracts are enforced according to their legal interpretation, business will regulate itself, and methods will be discovered to avoid inconveniences.

These general views as to the liability of carriers have prevailed very extensively in this country. *Judson v. Western Railroad*, 4 Allen, 520. *Straiton v. New York & New Haven Railroad*, 2 E. D. Smith, 184. *Hunt v. New York & Erie Railroad*, 1 Hilton, 228. *Briggs v. Vanderbilt*, 19 Barb. 222. *Hood v. New York & New Haven Railroad*, 22 Conn. 1. *Bowman v. Hilton*, 11 Ohio, 303. *Bissel v. Price*, 16 Illinois, 408. *Farmer*

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*& Mechanics' Bank v. Champlain Transportation Co.* 23 Verm. 209.

The defendants in the present case are the carriers on the last line of transportation who delivered the goods to the consignee. The Michigan Central Railroad Company received them from H. H. Shufeldt, and gave him a receipt, the material part of which is as follows:

"Received of H. H. Shufeldt, consigned to Charles B. Darling, Boston, Mass., the following described packages, in apparent good order, (contents and value unknown,) consigned as marked and numbered in the margin, to be transported over the line of this road to the company's freight station at its terminus, and delivered in like good order to the consignee or owner at said station, or to such company or carriers (if the same are to be forwarded beyond said station) whose line may be considered a part of the route to the place of destination of said goods or packages; it being distinctly understood that the responsibility of this company as a common carrier shall cease at the station where delivered to such person or carrier; but it guarantees that the rate of freight shall not exceed fifty-five cents per one hundred pounds and charges advanced by this company."

This contract does not attempt to bind other carriers, except so far as it guarantees the rate of freight. But the guaranty itself is a contract of the Michigan Central Railroad Company with the consignor, and all the stipulations are so framed as to exclude the idea of joint responsibility with other carriers.

It does not appear that there was any express contract between the defendants and the Michigan Central Railroad Company; but it is stated that the Western Railroad Corporation paid the charges advanced on said goods, covering the freight to Albany, pursuant to usage, and on the arrival of the goods at Boston the plaintiff paid the same to the defendants, with the freight from Albany. The defendants' bill is made out in two items. The first is a charge of the freight from Albany. The second is a charge of expenses. Annexed to it is a bill of these expenses. It is a bill of the New York Central Railroad Corporation, in which the plaintiff is charged with freight of the goods

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from Buffalo to Albany in one item, and advanced charges in another item. Thus it appears that the defendants and the Western Railroad Corporation had some connection between themselves, but had no joint dealings with the New York Central Railroad Company, or any road beyond it. Their charges were distinct, and the defendants collected the whole expense of the plaintiff because they had advanced the portion that was due to the other carriers when they took the goods. They are not parties to the contract made beyond Albany, and upon the principles above stated they are not liable for the default of any of the parties to those contracts. *Exceptions overruled.*

*W. Brigham*, for the plaintiff.

*G. S. Hale*, for the defendants.



## HENRIETTA LEVI vs. LYNN AND BOSTON RAILROAD COMPANY.

In an action against a street railway corporation to recover for the loss of a box of merchandise delivered to them to be carried for hire on the front platform of one of their cars, the plaintiff, for the purpose of showing them to be common carriers of goods, may prove that other persons had paid money to their conductors, with the knowledge of their superintendent, for the carriage of merchandise by them; and if it is proved that they were common carriers of goods, and that they received the box to be carried upon one of their cars for hire, and that it was lost during a trip, they are responsible for its value.

If in such case no instructions were asked or given at the trial in regard to the question whether the plaintiff was negligent in placing the box on the front platform of the car, or whether he actually placed the same in the custody of the defendants' servants, and the evidence upon these questions is not reported, they are not open for argument on the exceptions.

TORT against a street railway corporation to recover the value of a box of merchandise.

At the trial in the superior court, before *Brigham, J.*, the plaintiff introduced evidence tending to show that on the 8th of July 1864 she placed upon the front platform of one of the defendants' cars in Boston a box of merchandise, and then took her seat within the car to go to Chelsea, and paid the conductor her fare and also a certain sum as compensation for carrying the

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box to Chelsea. She was also allowed to introduce evidence, under objection, tending to show that two other persons had at other times paid to conductors of the defendants' cars money for the conveyance of merchandise to Chelsea in addition to their own fare, with the knowledge of the superintendent of the railroad.

The above are all the facts recited in the bill of exceptions.

The judge instructed the jury as follows :

" If the conductor of the defendants' car received from the plaintiff a sum of money as a consideration for the transportation of her package of merchandise together with the plaintiff, and the conductor so received said money in conformity with a practice of the conductors employed to conduct cars of the defendants, known and assented to by the defendants, the defendants would thereby become responsible for the delivery of plaintiff's packages at her destination on their road.

" If the plaintiff paid no consideration for the transportation of her packages of merchandise, but was permitted by the conductor to deposit them on the platform of the car, and in a place designated by him for transportation with the plaintiff to her destination on the defendants' road, in conformity with a practice of the conductors employed by the defendants, known and assented to by the defendants, then the defendants would be responsible only for gross negligence in the transportation of said packages.

" By thus permitting said packages to be deposited and transported, the defendants became responsible for the exercise, by their servants conducting and driving said car, of that care of such packages only which the conductor and driver might consistently with all their duties in the driving and conducting of the car, and the receiving, transporting and delivering of passengers on the road in safety, exercise, in view of the facts of the place where said packages were deposited, the construction and arrangement of the platform, and the use and occupation of the platform at the same time by the person acting as driver upon said car. The absence of this care would be gross negligence. Knowledge of the practice of conductors and assent by

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the superintendent would authorize the jury to infer knowledge and assent by the defendants."

The jury found that the plaintiff did pay a sum of money as a consideration for the transportation of her packages of merchandise in addition to her own fare, and rendered a verdict for the plaintiff. The defendants alleged exceptions.

*D. Peabody*, for the defendants. 1. The plaintiff did not use due care in placing her box on the front platform. She was bound to know that it was liable to be thrown off by the motion of the car. The platforms of these cars are not constructed with reference to carrying merchandise upon them. 2. The box never passed from her control. It was in summer, and the doors of the car were of course open. The box was not put under the control of the conductor. If money was paid, it was in compensation for the space the box would occupy, or for the privilege of putting it there, and not for any care or control of the defendants' servants. 3. The evidence was insufficient to establish a custom of the defendants to carry merchandise for hire; and it was necessary for the plaintiff to establish such custom. *Allen v. Merchants' Bank*, 22 Wend, 222.

*A. Hemenway*, for the plaintiff. The first two points taken by the defendants are not open on this bill of exceptions. The evidence of custom was competent and sufficient. *Eager v. Atlas Ins. Co.* 14 Pick. 146. *Winsor v. Dillaway*, 4 Met. 221. *Fay v. Noble*, 12 Cush. 1. *Lester v. Webb*, 1 Allen, 34. The defendants were thereby proved to have become common carriers of goods. *Redfield on Railways*, § 138, n. *Dwight v. Brewster*, 1 Pick. 53. *Kimball v. Rutland & Burlington Railroad*, 26 Verm. 247. *Gordon v. Hutchinson*, 1 Watts & S. 285.

*COLT, J.* The plaintiff resorted to the usual and proper mode of proving that the defendants had assumed the business of common carriers of merchandise upon their cars, and produced evidence that two other persons had paid money at other times to the defendants' conductors for the transportation of merchandise, with the knowledge of the superintendent of the road. For anything that appears to the contrary in the exceptions, it may have been proved that these two other persons had

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so employed the defendants in repeated instances. The evidence was entirely proper to go to the jury, and, in the absence of anything to control or contradict it, would be sufficient to warrant them in finding that the defendants had assumed to be and were common carriers, when the plaintiff's box was delivered to them for transportation.

The jury were in effect instructed that, if they found that the defendants were common carriers, and that the plaintiff's box was delivered to them for transportation, and the price of transportation paid by her, they would be responsible for the delivery of the box at its place of destination. And these instructions were sufficiently correct and accurate.

If the defendants were proved to be common carriers the law supplies the proof of the contract, so far as regards the extent and degree of liability, and, the bailor having proved delivery to a carrier and loss, the burden is on the carrier to discharge himself from liability, within the exceptions which the law creates. No question seems to have been raised or instructions required in regard to the limit of the defendants' liability in this case, if regarded as common carriers. *Clark v. Barnwell*, 12 How. 272. *Alden v. Pearson*, 3 Gray, 342.

The question whether the plaintiff was herself negligent, in placing her property on the front platform of the car, and the point that she did not in fact part with the custody of the box, and so cannot charge the defendants with her loss, are not open to the defendants upon these exceptions, for it does not appear that any such question was raised or point made at the trial. *Brigham v. Wentworth*, 11 Cush. 123. *Reed v. Call*, 5 Cush. 14. *Moore v. Fitchburg Railroad*, 4 Gray, 465.

*Exceptions overruled.*

## JOHN VINTON vs. MIDDLESEX RAILROAD COMPANY.

The conductor of a street railway car may exclude or expel therefrom a person who by reason of intoxication or otherwise is in such a condition as to render it reasonably certain that by act or speech he will become offensive or annoying to other passengers therein, although he has not committed any act of offence or annoyance.

TORT against a street railway corporation to recover damages for the act of one of their conductors in expelling the plaintiff from a car in which he was a passenger.

At the trial in the superior court, before *Morton, J.*, it appeared that the plaintiff was a passenger in one of the defendants' cars, and was expelled by the conductor. There was no evidence that any rule or regulation had ever been adopted by the defendants, authorizing their conductors to expel passengers for any cause. The defendants introduced evidence tending to show that at the time of the expulsion the plaintiff was intoxicated, and used loud, boisterous, profane and indecent language towards the conductor and attempted to strike him, and that he was therefore expelled. But the evidence on this point was conflicting. There were four women in the car as passengers.

The defendants requested the court to instruct the jury, amongst other things, as follows: "If the jury find that the plaintiff was in the defendants' car in a state of intoxication, so as reasonably to induce the conductor to believe that the plaintiff would be an annoyance to the passengers, or if the plaintiff so conducted, or used boisterous, profane or indecent language, naturally calculated to annoy the passengers, and persisted in so doing after being requested to be quiet, the conductor would be justified in removing him, using no more violence than was necessary to effect his removal."

The judge declined so to rule, and instructed the jury as follows: "If the plaintiff, by reason of intoxication or otherwise, was, in act or language, offensive or annoying to the passengers, the conductor had a right to remove him, using reasonable force. If the conductor, in the performance of his service as conductor, forcibly removed the plaintiff without justifiable cause, or if,

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having justifiable cause, he used unnecessary and unreasonable violence, in kind or degree, in removing him, the defendants are liable."

The jury returned a verdict for the plaintiff, with \$1000 damages; and the defendants alleged exceptions.

*L. M. Child*, (*L. Child* with him,) for the defendants. It is the duty of the proprietors of steamboats and railroads, as common carriers of passengers, to provide for the quiet and comfort of their passengers, and to secure them from annoyance, fright and terror, resulting from the misconduct of their servants or of other passengers. *Commonwealth v. Power*, 7 Met. 601. *Jencks v. Coleman*, 2 Sumner, 221. *Camden & Amboy Railroad v. Burke*, 13 Wend. 611. *Pardee v. Drew*, 25 Wend. 459. *Pickford v. Grand Junction Railway*, 8 M. & W. 372. Angell on Carriers, § 525. The discharge of this duty falls within the scope of the employment of the conductor of a railroad car; and if he has good reason to believe that the other passengers cannot otherwise be secured from annoyance, he may remove a passenger.

*T. H. Sweetser & W. S. Gardner*, for the plaintiff. The conductor of a car has no right to anticipate that one passenger will become an annoyance to others. If there is no annoyance at the time, and the passenger is conducting himself properly, he cannot be removed. In this case, the defendants did not ask for an instruction that the plaintiff might properly be put off the car if he annoyed the conductor, or if he was intoxicated; but that if he was in a state of intoxication so as reasonably to induce the conductor to believe that he would be an annoyance, he might be removed. But the conductor himself may have been intoxicated. The ruling that was requested did not provide that the jury should find that the conductor had reason to believe that fact.

No regulations have been established by the defendants; and therefore a passenger agrees simply to behave in a decent and proper manner. If he does so, he has a right to ride; he has a license to enter the car, and a right to stay there, until he does something improper. If anybody undertakes to exercise a



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judgment on this subject, he must be sure to judge right. In this case the defendants ask that if the conductor is afraid that a passenger will do something improper, he may expel him. If this rule is adopted, a laboring man, tired and sleepy, may be ejected because the conductor thinks he is intoxicated. In some of the cases cited, express rules of the carriers were violated.

BIGELOW, C. J. By the instructions under which this case was submitted to the jury, in connection with the refusal of those which were asked for by the defendants, we are led to infer that the learned judge who presided at the trial was of opinion that the defendants and their duly authorized agents had no legal power or authority to exclude or expel from the vehicles under their charge a passenger whose condition and conduct were such as to give a reasonable ground of belief that his presence and continuance in the vehicle would create inconvenience and disturbance and cause discomfort and annoyance to other passengers. Such certainly were the result and effect of the rule of law laid down for the guidance of the jury at the trial. We are constrained to say that we know of no warrant, either in principle or authority, for putting any such limitation on the right and authority of the defendants as common carriers of passengers, or of their servants acting within the scope of their employment.

It being conceded, as it must be under adjudicated cases, that the defendants, as incident to the business which they carried on, not only had the power but were bound to take all reasonable and proper means to insure the safety and provide for the comfort and convenience of passengers, it follows that they had a right, in the exercise of this authority and duty, to repress and prohibit all disorderly conduct in their vehicles, and to expel or exclude therefrom any person whose conduct or condition was such as to render acts of impropriety, rudeness, indecency or disturbance either inevitable or probable. Certainly the conductor in charge of the vehicle was not bound to wait until some overt act of violence, profaneness or other misconduct had been committed, to the inconvenience or annoyance of other passengers, before exercising his authority to exclude or expel the offender

The right and power of the defendants and their servants to prevent the occurrence of improper and disorderly conduct in a public vehicle is quite as essential and important as the authority to stop a disturbance or repress acts of violence or breaches of decorum after they have been committed, and the mischief of annoyance and disturbance have been done.

Indeed, if the rule laid down at the trial be correct, then it would follow that passengers in public vehicles must be subjected to a certain amount or degree of discomfort or insult from evil disposed persons before the right to expel them would accrue to a carrier or his servant. There would be no authority to restrain or prevent profaneness, indecency or other breaches of decorum in speech or behavior, until it had continued long enough to become manifest to the eyes or ears of other passengers. It is obvious that any such restriction on the operation of the rule of law would greatly diminish its practical value. Nor can we see that there is any good reason for giving so narrow a scope to the authority of carriers of passengers and their agents as was indicated in the rulings at the trial. The only objection suggested is, that it is liable to abuse and may become the instrument of oppression. But the same is true of many other salutary rules of law. The safeguard against an unjust or unauthorized use of the power is to be found in the consideration that it can never be properly exercised except in cases where it can be satisfactorily proved that the condition or conduct of a person was such as to render it reasonably certain that he would occasion discomfort or annoyance to other passengers, if he was admitted into a public vehicle or allowed longer to remain within it.

*Exceptions sustained.*

**EMANUEL W. HAMILTON vs. FREDERICK W. NICKERSON.**

If a common carrier by water cannot find the person to whom goods carried by him are consigned, or any person representing the owner, and thereupon delivers them to a responsible warehouseman for safe keeping, receiving from him payment of all his charges, and there are no special facts to show that the warehouseman undertook to act as bailee of the carrier and not of the owner or consignee, and the goods are never called for, the carrier is not entitled to reclaim them from the warehouseman by paying the amount of his charges.

TORT to recover for the conversion of ten barrels of zinc paint.

At the trial in the superior court, before *Morton, J.*, it appeared that the plaintiff, being a common carrier by water, received the zinc paint on board his schooner at New York, to be transported to Boston, and safely and with all reasonable despatch conveyed it to Boston, where, upon his arrival, not being able to find the consignee, and after making every effort in his power to find him, he placed the goods in store with the defendant, who was and is a responsible person in that business in Boston, as store-house keeper, for safe keeping, and received from the defendant payment of all his charges upon the goods, including freight, cartage, &c., for which he gave the following receipt: "Boston, April 18, 1860. Mr. ——— to Despatch Line Dr.

For freight of 10 Bls. Paint at 20	\$2.00
Boston Wharfage	.40
Cartage	.50
	<hr/>
	\$2.90

From New York per Schr. Cabot.

Received payment, E. W. Hamilton."

Neither the consignee nor consignor has ever appeared to claim the goods; and the defendant retained them in his store-house until the spring of 1864, when, after applying to the plaintiff for information as to the consignee and learning nothing further, without notice to or authority from the plaintiff, he sold them at public auction. The plaintiff had demanded the goods of the defendant and offered to pay him the amount of his charges, and the defendant refused to surrender them.

Upon this evidence the defendant requested the court to rule that by the acts of the parties the defendant became the bailee of the owner of the goods, and that the plaintiff by his acts had discharged himself from further liability, and could not sustain this action; but the judge ruled that the plaintiff had such an interest in and right to the goods as entitled him to maintain his action. A verdict was accordingly returned for the plaintiff, and the defendant alleged exceptions.

*A. F. L. Norris*, for the defendant, cited *Story on Bailm.* §§ 126, 543; *Angell on Carriers*, § 291; *Fisk v. Newton*, 1 Denio, 45; *Mayell v. Potter*, 2 Johns. Cas. 371; *Phillips v. Earle*, 8 Pick. 182.

*H. A. Scudder*, for the plaintiff, cited *Angell on Carriers*, § 502; *Story on Bailm.* § 105; *Eaton v. Lynde*, 15 Mass. 242; *Dillenback v. Jerome*, 7 Cow. 297.

HOAR, J. There is no doubt that a common carrier is bound, not only for the safe carriage of the goods intrusted to him, but for their delivery to the owner or consignee, according to the usual course of business and the nature of his contract. Nor do we suppose that it can be questioned that the carrier is entitled to the possession of the goods until he has discharged himself of his obligation in that capacity. What facts amount to a delivery, so as to discharge the carrier, where an actual delivery to the consignee or owner becomes impracticable, or is not required by the nature of the transportation undertaken, according to the usual course of business, has been largely discussed in the text books and reported cases, and there is some variance in the decisions. But it is clear, upon principle and authority, that when, as in the case presented by these exceptions, the carriage is to be by a ship from one port to another, and the goods have been placed on board by a consignor, and safely carried to the place of destination, and there landed, if the carrier, upon due and diligent inquiry, is unable to find any consignee, or person representing the owner, to whom he can deliver the goods or give notice of their arrival, he is not obliged to take them again on board his vessel, or retain them in his own possession and at his own risk and charge for an unlimited period; but he may,

after a reasonable time has expired, store the goods for the owner with some suitable and responsible warehouseman, and thereby discharge himself from further liability. From the necessity of the case, such storing of the goods is equivalent to a delivery.

It has not been denied by the plaintiff's counsel that such is the true rule of law, and that the carrier may, by taking this course, exempt himself from responsibility to the owner of the goods. But the question is not between the carrier and the owner, but respects the right of possession between the carrier and the warehouseman. In this view, it appears to be a new question, the precise point not having been previously adjudicated; and it must be decided upon principle.

Undoubtedly the carrier, having lawfully obtained the custody of the goods, may retain that custody until he can deliver them to the owner or consignee, and until his charges for the carriage are paid, if he chooses to do so. He may make the warehouseman his own bailee, with the right to terminate the bailment at his pleasure, and assuming a liability to pay for the storage. But we think he may also do more than this. If he has the opportunity, and prefers to make the contract, he may make the warehouseman the agent and bailee of the owner, and thereby complete the delivery of the goods, and discharge himself from all further responsibility concerning them. If he did this, the warehouseman, paying the carrier his freight, would take the goods upon the credit of the owner and of the value of the goods themselves; his agency, although created by the carrier, would be for the owner directly; his payment of the carrier's charges would be on the owner's account, would discharge the carrier's lien, and terminate his interest in the property. He would have no claim against the carrier in case of loss, and the carrier would have no right to interfere further with the property. The warehouseman would not be the bailee of the carrier, but of the owner.

The importance and necessity of such a power in a carrier is apparent in cases where his voyage is made to a port to which he has no intention of returning, and with which he has no means of ready or convenient communication. He is not bound

to assume a new and continuous obligation, not contemplated when he received the goods. His power to make a new contract on behalf of the owner results from his possession of the goods, without having it in his power to dispose of them in the manner originally intended; and he is not obliged to keep the custody of them, either personally or through a bailee of his own. The law then makes him the owner's agent, to provide on his behalf for the keeping of the goods.

The plaintiff in this case had the power and the right to make a contract with the defendant on his own behalf, or on account of the owner of the goods. If he had chosen to make the defendant his own bailee, the fact that the defendant advanced the freight would not be decisive against the maintenance of the action. But it is a fact which has a strong tendency to show that he made him the bailee of the consignee or owner. And upon the whole facts which the case discloses, we think the instructions asked by the defendant ought to have been given. That the plaintiff delivered the goods to the defendant, receiving from him the whole amount of his charges, and left him in possession of them for four years, without other act on his part, or evidence of a special contract other than that which would be naturally inferred from these facts, is sufficient evidence that the plaintiff considered himself, and was, free from further responsibility for, or interest in, the property.

The view which the court have taken of this question is precisely in conformity with the language used by the supreme court of New York in *Fisk v. Newton*, 1 Denio, 45, in deciding upon a carrier's liability to the owner, when no consignee could be found; a case more nearly resembling this than any other which has been cited, though presented in a somewhat different aspect.

*Exceptions sustained.*

**JOHN LE BARRON vs. EAST BOSTON FERRY COMPANY.**

A ferry company, being common carriers of passengers, are bound to furnish reasonably safe and convenient means for the passage of teams from their boats, appropriate to the nature of their business, and to exercise the utmost skill in the provision and application of the means so employed; but they are not bound to adopt and use a new and improved method, because it is safer or better than the method employed by them, if it is not requisite to the reasonable safety or convenience of passengers, and if the expense is excessive; and the cost of such improved method may be a sufficient reason for their refusing to adopt it.

In an action against a ferry company to recover damages sustained in passing from their boat, through the negligence of the defendants in failing to provide a safe and sufficient drop over which to pass, proof of due care on the part of the plaintiff, and of the injury, will not raise a presumption of law that the defendants were negligent, or change the burden of proof which rests upon the plaintiff to prove their negligence; but the same may be taken into consideration by the jury and allowed such weight as they think reasonable, in view of the whole evidence.

**TORT** against a ferry company to recover damages for a personal injury sustained in passing from their boat, at East Boston.

The declaration alleged that the defendants maintain a ferry between Boston and East Boston, for the ferriage of persons, horses, vehicles and merchandise, and the plaintiff drove a team, attached to a loaded sled, upon their boat at Boston, to be ferried to East Boston, and the defendants were bound to furnish and secure to him careful ferriage and fit and proper means for safe egress from their boat, but failed to do so, but the means therefor were insufficient; and the plaintiff, using all due care, attempted to drive his team off from the boat at the ferry slip in East Boston, but by reason of the defendants' negligence the drop of the slip projected so far above the deck of the boat that the sled struck suddenly and forcibly against the edge of the drop, and the load was thereupon thrown upon the plaintiff and crushed off one of his legs.

At the trial in this court, before *Hoar*, J., the plaintiff introduced evidence in support of the averments of his declaration and to show that the cause of the accident was of frequent and dangerous occurrence, well known to the defendants, and incident to the insufficiency of the apparatus and method employed by them for the safe passage of teams from their boat to the

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*Le Barron v. East Boston Ferry Company.*

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slip. The defendants introduced rebutting evidence on these points. The plaintiff proved that a new kind of drop, called a supplemental or adjusted drop, which completely obviated the liability to such an accident, and the only objection to which was the cost, had been adopted and constantly used on the People's Ferry in East Boston for more than two years before the occurrence of this accident, with the defendants' knowledge; and he contended that the defendants ought to have adopted this new drop, and that their failure to do so constituted negligence, and made them liable for the injury to the plaintiff, if the accident was caused as alleged.

The judge stated the rule to the jury as given in *Warren v. Fitchburg Railroad*, 8 Allen, 233, and ruled that the defendants were bound to furnish reasonably safe and convenient means for the exit of teams from their boats, appropriate to the nature of their business; and that they were bound to exercise the utmost skill in the provision and application of the means so employed; but that they were not bound to adopt and use a new and improved method, because safer or better than the methods employed by them, if it was not requisite to the reasonable safety or convenience of passengers, and if the expense was excessive; and that the cost of such improved method might be a sufficient reason for their refusing to adopt it.

The plaintiff also contended that, all due care on his part and the occurrence of the accident alleged being proved, the law would imply negligence on the part of the defendants; and the burden of proof then rested on them to explain the cause and exculpate themselves. The judge declined so to rule, but instructed the jury that the burden of proof was upon the plaintiff to show that negligence of the defendants caused the injury of which he complained; that the burden of proof was upon the plaintiff to show that he was in the exercise of reasonable care, so that the injury was not, to any extent, caused by a want of reasonable care on his part; and that the fact, if proved, that the plaintiff was using reasonable care, and that an accident occurred, did not raise a presumption of law that the defendants were negligent, or require them to show that they were not, and



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did not change the burden of proof; but that the jury might give it such weight as a fact and draw such inference from it as they should think necessary or reasonable, in view of the whole evidence; and, if they saw fit, might infer that the defendants were negligent.

The jury returned a verdict for the defendants, and the plaintiff alleged exceptions.

*G. H. Kingsbury*, for the plaintiff. The general rule of law is that common carriers of passengers are bound to carry securely, so far as human care and foresight can avail. *Ingalls v. Bills*, 9 Met. 1. *Edwards v. Lord*, 49 Maine, 279. *Derwort v. Loomer*, 21 Conn. 245. *Caldwell v. Murphy*, 1 Duer R. 241. This rule applies in its full strictness to ferrymen. 2 Kent Com. (6th ed.) 599. Angell on Carriers, §§ 82, 130, 537 *a*. Story on Bailm. § 496. If the modes employed by a carrier involve a notorious liability to a certain kind of accident, which is obviated by an approved method adopted by another carrier doing the same kind of business, he manifestly fails to bring himself within the requirements of law. He wilfully subjects his passengers to risks and injuries which he might avoid. The matter of cost is not an element in the question of his obligation, in such a case. Railroad companies are held bound to adopt all well known tests and improvements for the safety of passengers. *Seaver v. Boston & Maine Railroad*, 14 Gray, 466. *Cayzer v. Taylor*, 10 Gray, 274. *Hegeman v. Western Railroad*, 3 Kernan, 9. The reason of the rule applies with equal force to ferrymen.

Proof of due care on the part of the plaintiff, and of the occurrence of the accident, changed the burden of proof. *Ware v. Gay*, 11 Pick. 106. *McKinney v. Neil*, 1 McLean, 540. *Stokes v. Saltonstall*, 13 Pet. 181. *Hays v. Kennedy*, 3 Grant, (Penn.) 351. *Carpue v. London & Brighton Railway*, 5 Q. B. 747.

*G. A. Somerby*, for the defendants.

COLT, J. The claim of the plaintiff that the failure of the defendants to adopt the new supplemental or adjusted drop which had been adopted and used by another ferry company with the knowledge of the defendants, constituted negligence,

and made them liable for the plaintiff's injury, cannot be sustained, although it was proved that such new drop obviated all liability to the accident which caused his injury. The question of negligence was a question upon all the evidence for the jury, and we think it was submitted to them under full and accurate instructions.

A common carrier of passengers contracts in law that the kind of conveyance which he adopts shall be a reasonably safe and convenient mode of transportation, for its kind. The modes of conveyance in use by passenger carriers, both by land and water, vary as the exigencies of the traffic and its remunerative character require and justify. To require all carriers to adopt alike expensive provisions for the safety of passengers, without reference to the nature of their employment or the amount of their business, would be impracticable and absurd. It would be like requiring all the public highways in the Commonwealth to be kept in a like state of repair, without reference to the nature of the country through which they pass, or the amount of travel they accommodate. The different kinds of ferries in use vary from the rudest form of boat, drawn from shore to shore by ropes, propelled by oars or horse-power or the current of the stream, with landing-places on the banks, to those expensive steamboats which ply between populous districts, provided with every convenience of access from docks and ferry-houses. It cannot be necessary, in order to protect themselves from liability, that all these different ferrymen should adopt those appliances which can be shown to be the safest, and which others in the same occupation use. And yet the rule contended for by the plaintiff would require every ferryman, without regard to the nature or amount of his business, to use the most improved mode of securing the safety of passengers, regardless of expense, if thereby a liability to injury peculiar to the mode adopted by him could be avoided, either in the transportation or in the means provided for entrance upon or exit from his boat.

This whole matter of negligence is for the jury, and is and should be affected by the nature of the transportation which the carrier has undertaken to afford, and the amount and character

of his business. If the means of transportation are adapted to the reasonably safe carriage of passengers upon that particular kind of conveyance, and he exercises the utmost skill in the use of such means, he has discharged his legal obligations.

The case of *Hegeman v. Western Railroad*, 3 Kernan, 9, cited by the plaintiff, was an action for an injury sustained by a passenger and caused by the breaking of an axle. There was evidence that a safety-beam, then in use on many other railroads, would secure safety in case of such an accident; and although this means of safety was adopted by carriers engaged in precisely the same kind of transportation with the defendants, yet the judge charged the jury that if they should be of opinion that a safety-beam was designed and calculated to prevent an injury to passengers in case of the breaking of an axle, it did not necessarily follow that the defendants were liable because they had not adopted it, but it would be for the jury to say whether the defendants were or were not negligent in informing themselves of the necessity and utility of the invention, and availing themselves of it.

The plaintiff further asked the court to rule that, having proved due care on his part, and the occurrence of the accident, the law would imply negligence on the part of the defendants, and cast upon them the burden of proving that the accident happened without their fault. We think such instruction would have been erroneous, as applied to the case as presented upon the pleadings and evidence. The declaration alleges that the negligence of the defendants consisted in not providing safe exit for the plaintiff with his loaded wagon from their ferry-boat, so that in attempting to pass off the boat the wheels of the wagon struck violently against the drop of the ferry, and threw the load upon the plaintiff, causing the injury complained of.

The general rule, that the plaintiff, in actions of this description, is bound to prove negligence on the part of the defendants as the cause of the injury, has been apparently modified in a class of cases in which it is said that proof of due care on the part of the plaintiff, with proof of the accident, is *prima facie* evidence of negligence on the part of the defendants. An

examination of these cases, we think, will show that there is in them no real invasion of the general rule as to the burden of proof. It will be found, we believe, in all of them that the nature of the accident was such, or the attending circumstances such, that proof of the accident alone raised a presumption of negligence, and that the same evidence which proved the injury done also proved the defendants' negligence, or developed circumstances from which it must be presumed. Thus in *Carpue v. London & Brighton Railway*, 5 Q. B. 747, where the injury was caused by a train running off the track and overturning the carriage in which the plaintiff was a passenger, Denman, C. J. told the jury that, "it having been shown that the exclusive management of the machinery and the railway was in the hands of the defendants, it was presumable that the accident arose from their want of care, unless they gave some explanation of the cause." So in *Stokes v. Saltonstall*, 13 Pet. 181, the injury was occasioned by the overturning of a stage coach; and in *Ware v. Gay*, 11 Pick. 106. the accident was of a similar nature, occasioned by the running off of the wheel of the coach in which the plaintiff was a passenger. In these cases clearly the nature of the accident afforded proof of the defendants' negligence.

The plaintiff, in proving his injury, must ordinarily prove the nature of the accident and the circumstances; and when such proof has any tendency to prove negligence, and especially when the defendant has exclusively the means of knowledge within his control as to what caused the injury, it is said the burden is cast upon the defendant to explain the cause, and exculpate himself.

Upon recurring to the facts in this case, it appears that this accident might have happened without negligence on the part of the defendants, and that the means of knowledge as to the cause of the injury were equally within the reach of both parties. The court therefore rightly declined to give the instructions asked for upon this point, and for the reasons stated the instructions which were given were sufficiently favorable to the plaintiff.

*Exceptions overruled.*

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Barber & wife v. City of Roxbury.

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**AZEL W. BARBER & wife vs. CITY OF ROXBURY.\***

A rope stretched across a highway, above the ground, and attached at each end to objects which are outside of the limits of the highway, and in temporary use, is not a defect or want of repair in the highway for which a city is liable to a traveller who receives an injury from coming into collision with it, while it is in motion from human agency.

TORT to recover damages for a personal injury received by the female plaintiff in consequence of a defective highway.

At the trial in this court, before *Chapman, J.*, it appeared that in March 1864 Benjamin Merriam, the city marshal of Roxbury, had occasion to search a cave for stolen goods, which cave was situated about six feet above the sidewalk and a few feet easterly of the east line of Shawmut Avenue, a highway in Roxbury. In doing this it was necessary to remove some very heavy stones, which could not be lifted without the aid of a derrick. On the opposite side of the avenue, and about forty feet therefrom, there was a derrick, belonging to the city, with a guy which crossed the avenue. Merriam employed seven or eight hands and worked from about eight o'clock in the evening till about half past ten, when the plaintiffs came from Boston, driving in a carryall with one horse. The party were then at work engaged in removing a stone, by means of a rope attached to the derrick, at one end, and at the other end to a chain which was fastened to the stone. At first the rope lay loosely upon the ground; and, as the crank of the derrick was turned, it was tightened and lifted up from the ground. The plaintiff's carryall, when it came to the rope, was struck by it, and the top torn off; and the rope also came in contact with the forehead of the female plaintiff, and injured her severely.

It was not contended by the plaintiffs that the road-bed was out of repair; and the defendants insisted that the facts did not show a defect in the highway. But the judge instructed the jury that the road might be defective, within the meaning of the statute concerning ways, even if the road-bed was in perfec

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\* This case was argued in March 1865.

repair, and that a rope stretched across the travelled path, as this was, constituted a defect, so long as it was in such a position as to come into collision with a carriage or a passenger, and make it unsafe or inconvenient for the traveller to pass, even though each of its ends was fastened at a point outside the limits of the highway, and though the rope was not left permanently in one position, but was moved by the turning of the crank; and, as the facts above stated were admitted to be proved, they should regard the way as being defective at the time of the collision.

The defendants offered evidence tending to show that they gave the plaintiffs notice of the obstruction in season to enable Mr. Barber to stop his horse; and contended that if they took reasonable pains to inform him of it the city was not liable, though he did not hear the notice or see the obstruction. But the judge instructed the jury that, as the parties had no right to obstruct the travelled path, no notice to the plaintiffs would be a defence, unless it was such that they could not disregard it without being guilty of negligence; that the burden was on the plaintiffs to prove that Mr. Barber used reasonable care, adapted to the circumstances in which he was placed; and that if he in driving his horse carelessly disregarded any warning that was given him, or was careless in any other respect, the plaintiffs could not recover.

The jury returned a verdict for the plaintiffs, with \$4775 damages; and the defendants alleged exceptions.

*J. W. May*, for the defendants.

*R. M. Morse, Jr.*, for the plaintiffs.

GRAY, J. The question upon the answer to which this case depends is, whether the facts stated in the bill of exceptions show an injury from a defect or want of repair in the highway. The statute provides that highways shall be kept in repair at the expense of the town or city in which they are situated, so as to be safe and convenient for travellers; and that any person who receives or suffers bodily injury through a defect or want of repair in the highway may recover the amount of damage thereby sustained, in an action of tort against the city or town by law

obliged to repair the same. Gen. Sts. c. 44, §§ 1, 22. These two sections, taken together, give the rule and measure of the liability of cities and towns. They are not liable for every defect or want of repair, nor for every object which makes the highway unsafe or inconvenient for travellers; but it must be both a defect or want of repair, and one which makes the highway unsafe or inconvenient; and the injury must be attributable to the defect or want of repair.

Anything in the state or condition of the highway, which renders it unsafe or inconvenient for ordinary travel, is a defect or want of repair. It may be a hole or trench, occasioned by imperfect laying out and working of the road-bed or by travel, by the act of public officers or private individuals or corporations, or by a storm or freshet or other natural cause. It may consist of a stone or log or other obstacle left on the surface, or of a post standing within the general course and direction of travel over the highway, or of a barrier fixed or stretched across the way, though not touching the soil of the highway. It may perhaps include trees or timber moved by wind or flood. The defect need not have been in exactly the same condition during the time necessary to affect the town or city with notice, if it has continued dangerous during that time. *Snow v. Adams*, 1 Cush. 447, and cases cited. *Merrill v. Wilbraham*, 11 Gray, 154. *Cogswell v. Lexington*, 4 Cush. 307. *French v. Brunswick*, 21 Maine, 29. *Winn v. Lowell*, 1 Allen, 177. And a city or town has been held liable for an injury occasioned by the fall of an awning, projecting over the highway, which had been so defective for twenty-four hours previously as to be dangerous to travellers, or likely to be thrown down by such winds, rains or storms as might ordinarily occur. *Drake v. Lowell*, 13 Met. 292. *Pedrick v. Bailey*, 12 Gray, 163. *Day v. Milford*, 5 Allen, 98. But such awnings were fixed and permanent structures within the bounds of the highway; and this court has more than once expressed the opinion that in such a case the limit of this liability was reached. *Hixon v. Lowell*, 13 Gray, 64. *Keith v. Easton*, 2 Allen, 553, 554.

But we are not aware of any precedent for holding an illegals

use of the highway by men, animals, vehicles, engines or any other object, while movable and actually being moved by human will and direction, and neither fixed to, nor resting on, nor remaining in one position within the travelled part of the highway, to be a defect or want of repair for which the city or town is liable. And it is well settled that if the condition of things outside of the highway or the negligent or unlawful act of another person causes or contributes to the injury, the municipal corporation is not liable. Thus a city or town has been held not to be liable for an injury suffered from slipping on steps without the limits of the highway upon the sidewalk and there falling, when both steps and sidewalk were in an unsafe condition; *Rowell v. Lowell*, 7 Gray, 100; or resulting to a traveller from the upsetting of his sleigh by the combined effect of the town's neglect to remove snow and of another traveller's carelessly driving his vehicle against the plaintiff's; *Kidder v. Dunstable*, 7 Gray, 104; or from his vehicle being struck by a locomotive engine run on a railroad track illegally laid across the highway; *Vinal v. Dorchester*, 7 Gray, 421; or by being knocked down by a boy sliding on a sled upon a sidewalk which by such sliding had been made so slippery as to be dangerous. *Shepherd v. Chelsea*, 4 Allen, 113.

In the case before us, the derrick at one end of the rope and the stone at the other were not within the limits of the highway; the rope lay loosely on the ground, and does not appear to have obstructed the public travel, until the men engaged in removing the stone raised the rope gradually by turning the crank to which it was attached, so as to lift the rope from the ground across the travelled space and thence up out of the way of carriages or travellers; and the rope was in the act of being so raised when it struck the plaintiff's carriage and injured the female plaintiff. In the opinion of a majority of the court the injury thus occasioned cannot be said to have been caused by a defect or want of repair in the highway, and therefore the city is not liable under the statute. *Exceptions sustained.*

The plaintiffs thereupon became nonsuit.



**AZEL W. BARBER & wife vs. BENJAMIN MERRIAM.**

In an action to recover damages for a personal injury, a physician who attended the plaintiff after he had been in the care of another physician for two weeks may be asked and testify what, so far as he can judge had been the first physician's treatment, and in what respects it differed from his own; what effect, as far as he could judge, it had upon the plaintiff; and whether or not he saw any evidence that the plaintiff had been injured by his medical treatment.

The statements of a patient to his physician as to the character and seat of his sensations, made for the purpose of receiving medical advice, are competent evidence in his favor, in an action to recover damages for a personal injury, even though such statements were not made till after the action was brought.

TORT to recover damages for the same injury which was the subject of the preceding case.

At the trial in this court, before *Hoar, J.*, there was evidence that the female plaintiff, for the first two weeks of her illness, was attended by Dr. Holden, and afterwards by Dr. Weld, but they were never present together. Dr. Weld had previously made a single visit the morning after the accident, and prescribed for her, and made applications at the time. Dr. Weld's deposition was taken, and read to the jury. In that deposition the following questions and answers were allowed to be read to the jury, against the objection of the defendant:

"Q. So far as you could judge, what had been Dr. Holden's treatment of Mrs. Barber? In what respects did it differ from yours? A. His treatment was some counter-irritation of the spine, and some quieting medicines; and, though we both aimed at the same thing, we endeavored to reach it by different processes.

"Q. What effect, if any, did Dr. Holden's treatment have upon Mrs. Barber, so far as you could judge? A. She continued to improve until the time of her going down stairs; and the presumption is that the result was favorable.

"Q. Whether or not you saw any evidence when you visited her on the 17th of March that she had been injured by her medical treatment? A. None at all."

Before this testimony was read to the jury, Dr. Holden had

testified that his treatment had consisted chiefly of "nervines, friction and fomentation."

Dr. Guild, who succeeded Dr. Weld in attendance on the female plaintiff, was called as a witness, and was allowed to repeat to the jury the statements of the plaintiff herself, made since the suit was brought, for the purpose of receiving medical advice, as to the character and seat of her injuries and sensations, against the objection of the defendant.

The jury returned a verdict for the plaintiffs, with \$2875 damages; and the defendant alleged exceptions.

*G. Putnam, Jr.*, for the defendant. The questions to Dr. Weld called for his statement of matters which could not be within his personal knowledge. The statements of the female plaintiff to Dr. Guild ought not to have been admitted. They would clearly have been incompetent, if made to anybody except a medical attendant. *Bacon v. Charlton*, 7 Cush. 581, 586. It has frequently been stated by text-writers and judges that such statements, if made by a patient to a physician, may be given in evidence; but no adjudication of that point has been found. See *Gardner Peerage case*, 170, 175. The reason for such admission must be the improbability of any deception being practised. It is not like the case of death-bed statements, because the party may testify to the same matters. Certainly the exception to the general rule should not in any case be extended further than the reason for it extends. See 1 Greenl. Ev. § 102, n. 3. *Palmer v. Crook*, 7 Gray, 418, and cases cited. *Aveson v. Kinaird*, 6 East, 196. *Thompson v. Trevanion*, Skin. 402. In this case, the commencement of the action before the statements were made exposes them to the greatest suspicion; and the exception to the general rule should not be extended to such a case.

*R. M. Morse, Jr.*, for the plaintiffs.

BIGELOW, C. J. The questions and answers in the deposition of Dr. Weld are clearly competent and were rightly admitted. They are not open to the objections urged by the defendant's counsel. It does not appear that the witness testified to any fact which was not derived from his own personal observation

and examination of the patient. For aught that is disclosed in the exceptions, the knowledge which he had of the previous treatment of the female plaintiff by the physician who first attended her was derived entirely from his own diagnosis, unaided by any statements of other persons.

The other objection relied on in support of the exceptions is also untenable. In *Bacon v. Charlton*, 7 Cush. 581, 586, it was held that a party to an action might give in evidence his own complaints, exclamations and expressions, such as usually and naturally accompany and indicate bodily pain or injury; but that all statements of facts and narrations of prior occurrences by him, although connected with and relating to his malady or injury, are incompetent and ought to be excluded. It was intimated in that case that a different rule might be applicable to statements made by a patient to a medical man; and, on consideration, we entertain no doubt that there is a well founded distinction between these two kinds or species of evidence. The opinion of a surgeon or physician is necessarily formed in part on the statements of his patient, describing his condition and symptoms and the causes which have led to the injury or disease under which he appears to be suffering. This opinion is clearly competent as coming from an expert. But it is obvious that it would be unreasonable if not absurd to receive the opinion in evidence, and at the same time to shut out the reasons and grounds on which it was founded. Such a course of practice would take from the consideration of a court and jury the means of determining whether the judgment of the expert was sound and his opinions well founded and satisfactory. Certainly it ought not to be left to the option of the adverse party to determine whether the elements on which the conclusions of a medical witness are based should be drawn out on cross-examination. The party producing the witness and who relies on his opinion should be allowed the privilege of showing that his testimony as an expert is the result of due inquiry and investigation into the condition and symptoms of the patient, both past and present.

It is true that evidence of the statements of a party to his

physician or surgeon of his bodily ailments and symptoms is in its nature hearsay, and is liable to some of the objections which lie against that kind of testimony. Its admissibility is an exception to the general rule of evidence, which has its origin in the necessity of the case. The existence of many bodily sensations and ailments which go to make up the symptoms of disease or injury can be known only to the person who experiences them. It is the statement and description of these which enter into and form part of the facts on which the opinion of an expert as to the conditions of health or disease is founded. As they can be proved only by the declarations of the party whose bodily condition is the subject of inquiry, such declarations must be admitted, or the proof of them would fail altogether. To the argument against their competency, founded on the danger of deception and fraud, the answer is, that such representations are competent only when made to a person of science and medical knowledge, who has the means and opportunity of observing and ascertaining whether the statements and declarations correspond with the condition and appearance of the persons making them, and the present existing symptoms which the eye of experience and skill may discover. Nor is it to be forgotten that statements made to a physician for the purpose of medical advice and treatment are less open to suspicion than the ordinary declarations of a party. They are made with a view to be acted on in a matter of grave personal concernment, in relation to which the party has a strong and direct interest to adhere to the truth.

There can be no doubt that testimony of this character has always been received in the courts of this commonwealth without any serious doubt or question. In *Aveson v. Kinnaird*, 6 East, 198, 195, Lord Ellenborough seems to assume that its competency is too clear to admit of discussion. In the proceedings in the *Gardner Peerage case*, 78, 172, 175, it is taken for granted that the statements of a patient to a physician of symptoms and complaints are competent and admissible. The testimony which was offered and rejected in that case was not the declaration of a party in relation to the symptoms or sensations

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caused by a present existing disease or malady concerning which the witness was called on to give a medical opinion or advice but it was a statement in regard to an insulated fact, having no connection with the case under investigation, which must have occurred several months previously, which had no relation to the treatment or advice which the witness was called on to give at the time it was stated to him, and the truth of which he could in the nature of things have had no means of verifying by his own examination and observation.

It is suggested, in behalf of the defendant, that the statements in the present case were made by the plaintiff after the commencement of this action. But we do not think that for this reason only they ought to have been rejected. It was a circumstance which may have detracted from the weight of the evidence of the opinion of the physician, so far as it was founded on these statements. But as the statements were made to a medical man and for the purpose of receiving medical advice, they were competent and admissible.

*Exceptions overruled.*

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VERNON H. BROWN & another vs. WINNISIMMET COMPANY.

If a company is incorporated with power to establish and maintain a ferry and to own and possess vessels, steamboats and other personal property not exceeding in value a certain amount, the court cannot say that a contract by the company to let one of its steamboats at a certain rate per day, to be used for no specified length of time and in no specified place, is in excess of its corporate powers, if there is no proof that the steamboat was not necessary or proper to be used in the prosecution of the business of the ferry, or that by reason of owning it the company exceeded the limits of property which it was authorized to hold.

If the treasurer of a ferry company agrees in its behalf to let one of its steamboats at a certain rate, with an agreement that if rechartered any surplus that may be received over the specified rate shall be divided between the company and the charterer, and the steamboat is accordingly rechartered at a higher rate, and the corporation allows it to go into the possession of the second charterer and remain in his use for several weeks, and after its return collects of such second charterer the sum which he promised to pay therefor and enters the same upon its books, this is sufficient evidence to authorize a jury to find a ratification by the corporation of the contract of the treasurer.

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**CONTRACT.** The declaration was on an account annexed, one item being a charge of \$1650 for "one half cash due and paid by the United States government for charter money of steam ferry-boat Winnisimmet, forty-four days at two hundred dollars per day, after deducting one hundred and twenty-five dollars to be retained by said company." The second item was a charge of \$468.23 for cash paid by the plaintiffs for commission for procuring said charter, and interest.

At the trial in the superior court, before *Russell, J.*, the plaintiffs put in evidence the following agreement:

"The Winnisimmet Company will charter their iron ferry-boat Winnisimmet at one hundred and twenty-five dollars per day free of all commissions to Brown & Wilde, they to recharter at highest obtainable rate, returning to said Winnisimmet Company one half of any excess received over one hundred and twenty-five dollars per day, now in perfect running order and ready to leave at a day's notice. N. Matthews, Treasurer. Boston, August 8, 1862."

The plaintiffs also contended that by a subsequent agreement the defendants promised to pay one half the commissions paid to a Philadelphia broker, provided the steamboat could be chartered for two hundred dollars a day.

At the time of making the above contract, it was understood that she was to be rechartered to the United States, for service in the war.

The plaintiffs then introduced testimony that, upon receiving said instrument, they employed brokers in Philadelphia through whom a charter was made of said vessel to the United States government at two hundred dollars per day: and that said vessel was by telegraph ordered to be sent instantly, without waiting for charter parties; that this was communicated to the treasurer of the defendants' corporation and the superintendent thereof, and the captain of the boat was sent to the plaintiffs to receive orders for her outfit and sailing instructions; that the plaintiffs gave such orders and instructions, superintended personally her outfit and cleared her at the custom-house for Fortress Monroe, there to report to the United States quartermaster;

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and that said vessel sailed in the service of the United States on the 14th of August, and was retained forty-four days at the rate of two hundred dollars per day.

It was further in evidence that on the 30th of August 1862 the plaintiffs wrote to their said brokers in Philadelphia as follows:

“ We received your telegram as follows, late last evening: ‘ Telegraph us whose names, and to whom payable charters steamers to be made.’ We telegraphed to you to-day as follows: ‘ Winnisimmet owned by Winnisimmet Company, payable Nathan Matthews, boat valued \$32,000.’ ”

On the return of the steamboat a charter party was necessary for the collection of the money for her service, and there was difficulty in making such collection, from the failure of the master to bring home proper vouchers or certificates for the service rendered by him, for which neglect the plaintiffs contended that the defendants were responsible.

No charter was executed until after the steamboat had left the service of the United States, but the charter was then made, from directions previously given by the plaintiffs, in the name of the defendants, and the charter money was payable to the order of the defendants’ treasurer. The money, at the rate of two hundred dollars a day, was collected by the defendants and duly entered in their book, and the jury found specially that there was a subsequent implied agreement between the plaintiffs and the defendants by which the latter undertook to collect the money due from the government.

The defendants requested the court to rule that the above was not sufficient evidence to warrant the jury in finding that the defendants’ treasurer was authorized to make the agreements under which the plaintiffs claim, or to find that the same had been ratified by the defendants. The judge instructed the jury that there was no evidence of antecedent authority, but that there was evidence which would justify them in finding that the agreements were ratified, and left the question of fact to them.

The defendants also requested the court to rule that the agreements relied on by the plaintiffs were not authorized by the

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defendants' charter, and were void ; but the judge declined so to rule.

The jury returned a verdict for the plaintiffs, with \$1887.31 damages ; and the defendants alleged exceptions.

*P. W. Chandler & G. O. Shattuck*, for the defendants. The contracts under which the plaintiffs claim were not within the power of the defendants. The corporation was created with power only to own such steamboats as were necessary to accommodate the public travelling between Boston and Chelsea, and this was an attempt to divert their boats from their regular and only authorized business. *St.* 1833, c. 197. A provision therein authorizing a sale was to enable them to sell the old boats of a former company. The laws are strict as to ferry companies. The object is twofold ; to secure good ferries, and to put this means of communication into the hands of responsible parties. The charter is the only authority under which a corporation can act. But here the treasurer undertook to take this boat off from the line, and charter it without restriction of place or use. If he or the company could do this, they might take off all the boats ; they might have chartered it to the czar of Russia or the emperor of China ; or they might have gone into commercial enterprises generally, and chartered the boat to a merchant, to go to Savannah or New Orleans. Meanwhile, what would become of the inhabitants of Chelsea and the statutes of Massachusetts ? All of the provisions as to ferries would become utterly null. But a license to keep a ferry is not assignable. If they may let their boat for a short time, they may for six months. The defendants are not estopped to set up this defence. *Angell & Ames on Corp.* § 256. *Pennsylvania, &c. Steam Navigation Co. v. Dandridge*, 8 Gill & J. (Md.) 248. *Hood v. New York & New Haven Railroad*, 22 Conn. 502. *Harding v. Steamboat Maverick*, 5 Law Reporter, 106. *Pearce v. Madison, &c. Railroad*, 21 How. 441. Besides ; this charter was plainly for the purpose of obtaining from the government an exorbitant price in time of war. Such a contract is void. It is said that this ground is not open to the defendants, because not taken at the trial ; but the objection was taken that the contract was void, and this is one reason why it was void.



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If the corporation had power to make this contract, the treasurer had none. *E. Carver Co. v. Manuf. Ins. Co.* 6 Gray, 214. *Ashuelot Manuf. Co. v. Marsh*, 1 Cush. 507. Neither the company nor its officers could lease its boats. There is no resemblance between such an act and a sale of surplus stock or old boats. If the act was illegal, it cannot be ratified. It is said the defendants are liable because they have got the money. But it is a familiar rule as to executed contracts for unlawful purposes, that the law will not interfere. But there is no evidence of a ratification of the contract with the plaintiffs. We may admit that there was a valid contract with the United States; but the plaintiffs set up a contract to pay them. Where is the evidence of a ratification of that contract? There is no evidence that the officers of the company, except the treasurer and the master of the steamboat, knew that the plaintiffs had anything to do with it.

*E. D. Sohier & J. D. Bryant*, for the plaintiffs. The ruling of the judge that there was no evidence of antecedent authority in the treasurer to make these contracts was too favorable to the defendants. His execution of the agreement was *prima facie* evidence that the corporation was bound. *New England Marine Ins. Co. v. De Wolf*, 8 Pick. 56, 62, 63. *Hilliard v. Goold*, 34 N. H. 239. *Bank of United States v. Dandridge*, 12 Wheat. 64. The jury might infer original authority from the evidence of ratification. *Melledge v. Boston Iron Co.* 5 Cush. 179. *Thayer v. White*, 12 Met. 343. *Shaw v. Nudd*, 8 Pick. 12. *Amory v. Hamilton*, 17 Mass. 109. *Frothingham v. Haley*, 3 Mass. 70. There was ample evidence of ratification. *Hayward v. Pilgrim Soc.* 21 Pick. 275. *Episcopal Charitable Soc. v. Episcopal Church*, 1 Pick. 372. The contracts were not in violation of the defendants' charter. The occasional or incidental letting of a steamboat is an act, by necessary implication, within the scope of their corporate power. *Angell & Ames on Corp. c. 8, § 12*. The contracts are executed, and therefore the defendants cannot avoid their obligation on the ground that they had no authority to enter into it. *Allegheny City v. McClurkan*, 14 Penn. State R. 53. *Bulkley v. Derby Fishing Co.* 2 Conn. 252, 258. *Moss*

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v. *Rossie Lead Co.* 5 Hill, 137. *State of Indiana v. Woram*, 6 Hill, 33, 37. *Parker v. Boston & Maine Railroad*, 3 Cush. 117. *Proprietors of Quincy Canal v. Newcomb*, 7 Met. 276. *Chester Glass Co. v. Dewey*, 16 Mass. 94. *Little v. Obrien*, 9 Mass. 427.

BIGELOW, C. J. The main defence to this action appears to have been that the contracts or agreements on which the plaintiffs rely in support of their claim against the defendants were such that the latter had no power or authority to make them under the act of the legislature by which they were incorporated, and that they cannot for that reason be enforced in a court of law. The later English authorities seem to sanction the doctrine that such a ground of defence, although it may be "unbecoming and ungracious," or, in the stronger language of Lord St. Leonards, "indecent," is nevertheless legal and valid, if it be made to appear, either by the express provisions of an act of incorporation or by necessary and reasonable implication therefrom, that a contract which is sought to be enforced in an action at law against a corporation is beyond the scope of the powers granted by its charter; or, in other words, that the legislature did not intend that the body created by them should enter into contracts of a character like that which a plaintiff makes the foundation of a claim against it. *South Yorkshire Railway, &c. v. Great Northern Railway*, 9 Exch. 55, 85. *Bateman v. Ashton-under-Lyne*, 3 Hurlst. & Norm. 323. *Norwich v. Norfolk Railway*, 4 El. & Bl. 397, and cases cited. *Hawkes v. Eastern Counties Railway*, 1 De G., Macn. & Gord. 737, 760. A similar doctrine has been recognized and applied by courts in this country. *Pennsylvania, &c. Steam Navigation Co. v. Dandridge*, 8 Gill & J. 248. *Hood v. New York & New Haven Railroad*, 22 Conn. 502. *Pearce v. Madison, &c. Railroad*, 21 How. 441. *Angell & Ames on Corp.* § 256, and cases cited. It is on the principle which seems to be adopted by these authorities that the defendants rely to defeat the present action.

We have no occasion now to examine at length into the correctness of this doctrine, or to ascertain with precision its proper limitations or operation, because we are of opinion that the defendants do not bring the case at bar within any recognized

application of the rule. Looking only at the words of the act by which the defendants were incorporated, St. 1833, c. 197, we are unable to say that the contracts on which the plaintiffs rely are so far foreign to the object for which a charter was granted to the defendants as to require us to declare them to have been *ultra vires* and illegal, and that no action upon them can be maintained in a court of law. In the absence of all evidence of extraneous facts, and taking the case as it was presented at the trial, on a comparison of the contracts set up by the plaintiffs with the act incorporating the defendants, it appears to us that the scrupulous care and anxiety to keep within the limit of their corporate powers, which the defendants now manifest will not avail them in defence of this action, although it may induce them to exercise a greater caution in entering into contracts which they cannot fulfil without violating their charter. They were incorporated with power to establish, continue and maintain a ferry between the city of Boston and the town of Chelsea, and were authorized to own, hold and possess vessels, steamboats and such other personal property, not exceeding in value one hundred thousand dollars, as might be necessary and convenient for the better management of such ferry and of the affairs of said corporation. There can be no doubt that under this charter the main purpose for which the defendants were incorporated was to carry on the transportation of persons, vehicles, merchandise and other articles by means of a ferry across Charles River between the points designated in the act. All else was to be subordinate and incidental to this main design. So far, the argument urged in behalf of the defendants is sound and irrefragable.

But the next step is not so easily taken, nor does it lead to the point at which the defendants seek to arrive. It was not shown at the trial that the steamboat which was the subject of the contracts with the plaintiffs was not a necessary and proper vessel to be used by the defendants in the prosecution of the business of their ferry, nor that by reason of its ownership they had exceeded the limit of personal property which they were empowered by their charter to hold. Nor could it be

properly inferred that it was not reasonably required for the legitimate business of the corporation, because it was not in actual use by them on the ferry at the time the contract for letting it was entered into with the plaintiffs, and because it was chartered under that contract for the use of the government of the United States. Such an inference could be made only on the theory that the defendants were so restricted by their charter that they could not hold any greater number of vessels or steamboats than were absolutely required for present or immediate and constant use on their ferry, or, if they could be allowed to possess a larger number, that they could not use or employ them in any other business or for any other purpose whatever, but must suffer them to remain at their wharf to decay or deteriorate for the want of use, or, at least, in a condition in which they could be of no advantage to themselves or others. But we think such a narrow and restricted construction of the powers granted to the defendants is inconsistent with any reasonable view of the intention of the legislature in conferring on them a corporate franchise, and is not required by any considerations of justice or sound policy. On the contrary, we cannot doubt that under their charter they are authorized to hold any amount or kind of personal property, within the limit of value fixed by the act, which they may deem necessary or expedient for the proper conduct and management of the business of the ferry; that it is no excess of their corporate powers to own steamboats which are not required for immediate or constant use in the daily prosecution of their ordinary business, but which may be convenient or useful in case of sudden emergency or accident, or when those which are employed in the regular service of the ferry might be withdrawn for repairs; that it is not necessary that such extra or additional steamboats should be kept unemployed when not required for the business of the ferry, but that it is competent for the defendants to use them or to let them to others to be used in carrying on any legitimate business for which they are suitable, such as the towage of vessels and the transportation of passengers or merchandise, so long as such use is only temporary and incidental to the main purpose for which they are owned by the defendants.

We know of no rule or principle by which an act creating a corporation for certain specific objects or to carry on a particular trade or business is to be strictly construed, as prohibitory of all other dealings or transactions, not coming within the exact scope of those designated. Undoubtedly the main business of a corporation is to be confined to that class of operations which properly appertain to the general purposes for which its charter was granted. But it may also enter into contracts and engage in transactions which are incidental or auxiliary to its main business, or which may become necessary, expedient or profitable in the care and management of the property which it is authorized to hold under the act by which it was created. For example, it might perhaps be held that a corporation established for the purpose of manufacturing cotton and woollen cloth could not properly invest all its capital in mill powers and privileges, and engage exclusively in the business of leasing them to others to be used for manufacturing purposes, or that it could not lawfully confine its operations to the making of steam-engines and machines for sale. But no one could doubt that it would be within the scope of its powers to allow another person or corporation, for a reasonable compensation, to draw surplus water from its mill-pond, or to employ that portion of its steam power which was not required for its own use. So a stage-coach company or a street railway corporation would exceed its corporate powers if it engaged extensively in the transportation of passengers and merchandise on land or sea by steam; but it would be acting strictly within the limits of its capacity if it should occasionally let a horse or a coach or car, not required for its own immediate purposes, to another person or corporation, or should enter into a contract for the employment of its horses in another occupation during a portion of the year when the business of the corporation did not require their use. We can see no substantial difference between transactions of this character and that which the defendants entered into when they made the contracts with the plaintiffs.

These views of the extent of the authority granted to the defendants by the legislature are a decisive answer to the defence

relied on by them at the trial. The steamboat, under the contract with the plaintiffs, was let to the United States in a season of great public exigency, for military purposes; the defendants did not part with her control for any definite period of time, but only from day to day, nor did they send her to a great distance, where she could not be speedily recalled. The defendants retained the right and power to resume the possession and use of her at any moment. In this state of facts, we are of opinion that the court below took a correct view of the law, and was right in refusing to rule, as requested by the defendants, that the contracts entered into with the plaintiffs were not authorized by the defendants' charter, and were therefore void.

It was further objected on the part of the defendants, at the trial, that the evidence was insufficient to show that the treasurer of the corporation was authorized to enter into the agreement set up by the plaintiffs as the foundation of their claim, or that the agreement had been so ratified by the defendants as to be binding on them. On this point, the ruling of the court was sufficiently favorable to the defendants. The evidence of ratification was plenary, and well authorized the jury in finding the fact. Not only did the defendants allow the steamboat to continue in the employment of the United States for upwards of seven weeks, under the contracts made with the plaintiffs, without dissent or objection, but it is expressly found that the money under the charter party "was collected by the defendants and duly entered on their books," and that this money was collected by the defendants from the government under an agreement with the plaintiffs. It is difficult to see how a ratification could be more satisfactorily shown.

It was suggested at the argument that the contract between the parties for letting the steamboat to the United States was against public policy, and for that reason one under which the plaintiffs could not claim to recover. No such point seems to have been raised at the trial or ruled upon by the court. It is not, therefore, open on the exceptions. But we feel bound to say that we see no ground in the facts stated for any such assumption. It does not appear that the steamboat was let to the

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*Sohier v. Norwich Fire Insurance Company.*

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government at an exorbitant price, or that any undue advantage was taken of the public officers or agents, in making the charter. We cannot in the absence of proof judicially infer that such was the fact.

*Exceptions overruled.*

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**WILLIAM SOHIER vs. NORWICH FIRE INSURANCE COMPANY.**

In an action upon a policy of insurance on a theatre, which contains this clause, in connection with the description of the property insured: "This policy not to cover any loss or damage by fire which may originate in the theatre proper," the burden of proof is on the plaintiff to show a loss not originating in the theatre proper.

In such case, if a brick wall of the building becomes so heated from without as to set fire to the woodwork within the theatre, this is not a fire originating in the theatre proper, within the meaning of the policy.

CONTRACT upon a policy of insurance issued by the defendants upon the plaintiff's theatre in Boston. The written part of the policy contained the following clause, in the connection shown more fully in the opinion: "This policy not to cover any loss or damage by fire which may originate in the theatre proper."

At the trial in the superior court, before *Ames, J.*, a question arose upon the burden of proof, which is fully stated in the opinion.

It appeared by the evidence that a flue had, at the time the theatre was built, been constructed in one of the side brick walls, for a cold air ventilating flue, but that for some three or four years before the fire it had been used as a smoke flue from the furnace of a steam-boiler, situated in a coppersmith's shop adjoining the theatre, and used to furnish steam for a small steam engine in said shop. Evidence was introduced on both sides upon the question whether this flue was safe, and properly constructed for the use to which it had been so appropriated. It was contended that the fire in the furnace of the steam-boiler might have so heated the bricks in the wall of the theatre, between the flue and the inner surface of the wall in the theatre

proper, although the wall might be perfectly tight and free from any crack or imperfection, as to ignite the woodwork in the theatre proper. The defendants contended that if the fire did so originate from the use of the flue for the steam-boiler in the coppersmith's shop, heating the bricks of the wall so as to ignite the woodwork in "the theatre proper," then it was a fire originating "in the theatre proper," and asked the court so to instruct the jury; but the judge refused to do so, and instructed the jury that a fire so originating would not be "a fire originating in the theatre proper."

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

*J. G. Abbott & D. Thaxter, (F. Bartlett with them,)* for the defendants, cited, as to the burden of proof, *Vavasour v. Ormrod*, 6 B. & C. 432; *Central Bridge v. Butler*, 2 Gray, 130; *Gill v. Scrivens*, 7 T. R. 27; *Spieres v. Parker*, 1 T. R. 141; *Steel v. Smith*, 1 B. & Ald. 98; *Latham v. Rutley*, 2 B. & C. 20; *Teel v. Fonda*, 4 Johns. 304; *Ferguson v. Cappean*, 6 Har. & Johns. 394.

*G. A. Somerby*, for the plaintiff, besides some of the foregoing cases, cited *Commonwealth v. Hart*, 11 Cush. 130; *Whitwicke v. Osbaston*, 1 Lev. 26; *Jones v. Axen*, 1 Ld. Raym. 119; *Hotham v. East India Co.* 1 T. R. 638; *The King v. Hall*, 1b. 320; *The King v. Matters*, 1 B. & Ald. 362.

HOAR, J. The plaintiff sues upon a policy of insurance, the material parts of which, so far as the pending question is concerned, are as follows: "By this policy of insurance the Norwich Fire Insurance Company, in consideration of thirty-seven  $\frac{1}{100}$  dollars to them paid by the assured hereinafter named, the receipt whereof is hereby acknowledged, do insure *Wm. Sohier* against loss or damage by fire, to the amount of *twenty-five hundred dollars on his brick and slated building known as the National Theatre, situate on Portland Street, Boston, Mass. This policy not to cover any loss or damage by fire which may originate in the theatre proper.*" "And the said company do hereby promise and agree to make good unto the said assured, his executors, &c., all such loss or damage, not exceeding in amount the sum



insured, as shall happen by fire to the property as above specified from" &c. Some provisos against liability for loss by fire which might happen by invasion, riot, and the like, are in a later part of the policy. The clause in italics is written in the policy, the rest of the parts quoted being printed.

The first question raised by the bill of exceptions is, whether the burden of proof was on the plaintiff to show a loss by fire which did not originate within the theatre proper. This depends upon the construction given to the clause, "this policy not to cover any loss or damage by fire which may originate in the theatre proper." If that clause can be regarded as a proviso, that is, a stipulation added to the principal contract, to avoid the defendants' promise by way of defeasance or excuse, then it is for the defendants to plead it in defence, and support it by evidence. But if, on the other hand, it is an exception, so that the promise is only to perform what remains after the part excepted is taken away, then the plaintiff must negative the exception to establish a cause of action.

It is not always easy to determine to which class, whether of provisos or exceptions, a particular stipulation belongs; and this one is certainly very near the line. But after careful consideration the court are of opinion that this was an exception to the subject of the contract, that it put the burden of proof on the plaintiff, and that the ruling at the trial was therefore erroneous.

The qualification of the contract to which the parties agreed is not inserted with any technical formality or precision. But it is found between the statement of what is insured, and the promise to pay in case of loss; in close connection with and qualification of the description of the subject matter of the insurance. The provisos are set forth together in a different part of the instrument. It thus seems to be a direct limitation of the risk against which insurance is effected. The difference would only be a formal one, if, instead of the phraseology actually used, the language of the policy had been, "do insure against loss or damage by fire not originating in the theatre proper."

It would illustrate the operation of the phrase in question, and

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show its effect as an exception, if we suppose it applied to the building insured. If the clause in the policy had been, "this policy not to cover any loss or damage by fire to the part of the building used as a theatre proper," or "to the basement," or "to the southerly half of the premises," this would manifestly have been an exception from the subject matter of the insurance. And it is in like manner an exception to the risks taken by the defendants, when, in the same part of the policy in which they insure the risk of fire, and in the same connection, they state, in substance, that it is only fire which does not originate in the theatre proper against which they insure.

The first exception is therefore sustained. Upon the other point taken, we can have no doubt that the ruling at the trial was right. If there was a fire without the wall of the building insured, of such intensity as to heat the wall of the "theatre proper" sufficiently to cause the interior of it to burn, it did not "originate in the theatre proper," but was communicated from without.

*Exceptions sustained.*

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THOMAS L. ROBINSON vs. LYDIA A. J. TROFITTER.

If the purchaser of land at auction deposits with the auctioneer a sum of money, in compliance with the terms of sale, and the sale is afterwards abandoned by mutual consent of the parties, and the purchaser thereupon forbids the auctioneer to pay over the money to the vendor, and thus prevents him from doing so, the latter is not responsible to the purchaser for its return.

CONTRACT brought to recover the sum of two hundred dollars paid as "forfeit money" by the plaintiff to an auctioneer employed by the defendant to sell an estate which was bid off at auction by the plaintiff.

At the trial in the superior court, before *Russell, J.*, without a jury, it appeared that the money was deposited by the plaintiff in the hands of the auctioneer in compliance with the terms of sale, and that the defendant was to make a good title on or before April 27th 1864; that before that time the defendant executed a warranty deed of the estate, and deposited it in the

hands of her attorney for delivery to the plaintiff on payment of the purchase money, and notified the plaintiff's attorney thereof; that the plaintiff declared to the defendant his readiness to pay the purchase money, upon receiving a satisfactory title, but alleged that there was an incumbrance on the estate; that there was an undischarged attachment upon the estate, but on April 28th the plaintiff's counsel, who had used reasonable diligence in the investigation, had satisfied himself that this constituted no actual incumbrance thereon; that subsequently the parties interchanged messages concerning the execution of the agreement, but neither of them tendered a performance to the other, and the judge found that the bargain was given up by the parties; that on the 3d of May the defendant sold the estate to another person, and the plaintiff demanded the return of the deposit money of the auctioneer, but not of the defendant; and that the money has always remained in the hands of the auctioneer, each party having forbidden him to pay it to the other.

The judge found for the plaintiff, and the defendant alleged exceptions.

*G. H. Kingsbury*, for the defendant. The burden of proof was on the plaintiff to show a defect of title. *Packard v. Usher*, 7 Gray, 532. There was no such defect, and the defendant was ready and offered to perform her contract. There having been no default on her part, the deposit was forfeited. 1 Sugden on Vend. (7th Amer. ed.) 49, 50. *Green v. Green*, 9 Cow. 46. At all events, the plaintiff cannot, under the circumstances of this case, recover it of the defendant. The auctioneer alone is liable, if anybody. *Johnson v. Roberts*, 30 Eng. Law & Eq. R. 234. *Harrington v. Hoggart*, 1 B. & Ad. 577. *Burrough v. Skinner*, 5 Burr. 2639. *Edwards v. Hodding*, 1 C. Marsh. 377.

*R. D. Smith*, for the plaintiff. The sale having been abandoned, no demand of the deposit money was necessary before bringing suit. *Norfolk v. Worthy*, 1 Camp. 337. *Palmer v. Temple*, 9 Ad. & El. 519. *Harrington v. Hoggart*, 1 B. & Ad. 577. The money was paid to the auctioneer for the defendant and it went as a part of the purchase money. *Bamford v. Shuttleworth*, 11 Ad. & El. 926. There 's nothing to show that the

auctioneer received the money as a deposit; and the judge must have found that he received it as the defendant's agent. See *Palmer v. Temple*, 9 Ad. & El. 508. But upon a rescission of the sale even a deposit, strictly so called, ought to be recoverable from the vendor. An auctioneer is not a sworn and licensed officer, as in England, and he does not give bonds for the faithful performance of his duties. He is not the agent of both parties, *ex vi termini*. *Bartlett v. Purnell*, 4 Ad. & El. 792. The only cases where he has been so held are in reference to the statute of frauds. 2 Kent Com. (6th ed.) 540. *Buckmaster v. Harrop*, 13 Ves. 456. *Bird v. Boulter*, 4 B. & Ad. 443. *Morton v. Dean*, 13 Met. 388. *Gill v. Bicknell*, 2 Cush. 355. *Fessenden v. Mussey*, 11 Cush. 127. The auctioneer is selected, employed and paid by the vendor. All his interest is with the vendor. Loss of deposit by his insolvency falls on the vendor. 1 Sugden on Vend. (7th Amer. ed.) 50. *Edwards v. Hodding*, 1 C. Marsh. 377; S. C. 5 Taunt. 815. A deposit is a part payment of the purchase money; and, upon rescission or failure of sale, an action lies against the vendor to recover a deposit paid to the auctioneer. *De Bernales v. Wood*, 3 Camp. 258. *Jones v. Edney*, Ib. 285. *Simmons v. Heseltine*, 5 C. B. (N. S.) 571. *Sansom v. Rhodes*, 8 Scott, 544.

DEWEY, J. The plaintiff, upon the facts stated, is not entitled to maintain this action, not because the vendee of an estate sold by an auctioneer may not in some cases resort to the vendor for money paid by him as a condition of the sale, but for other reasons which will be stated.

The two hundred dollars paid to the auctioneer was, as stated in the case of the plaintiff, paid as "forfeit money" in case the vendee failed to perform his contract in reference to the purchase. There was no default shown to exist on the part of the owner of the land, either in reference to his title, or his readiness to execute a proper deed. The plaintiff acted under the false assumption that there was an existing incumbrance on the estate. The plaintiff never tendered the purchase money, and the judge who heard the case found as a fact that the bargain was given up by both parties. When the contract was thus

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mutually released, and the plaintiff discharged from all claim for forfeiture of the two hundred dollars, he knew that the money paid by him was in the hands of the auctioneer. He forbade the auctioneer to pay it over to the defendant, and demanded payment thereof by the auctioneer to himself, but has never demanded the same of the defendant. The plaintiff thus recognized the auctioneer as holding the money for himself exclusively, and by the mutual abandonment of the contract by the parties without any further stipulation as to the repayment of the two hundred dollars, he was entitled to recover the same of the auctioneer, and, under the circumstances of the case, of him alone.

The ruling of the judge, upon the facts found by him to be proved, that the defendant was liable in the present action, was erroneous.

*Exceptions sustained.*

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THOMAS TEAFFE vs. AMBROSE B. SIMMONS.

If the purchaser of land at auction deposits with the auctioneer a sum of money, in the presence of the vendor and in compliance with the terms of sale, and the sale is not completed through the fault of the vendor, the latter is responsible to the purchaser for the return of the money, although he has never personally received the same.

CONTRACT brought to recover the sum of one hundred dollars paid by the plaintiff to an auctioneer employed by the defendant to sell an estate which was bid off at auction by the plaintiff; the said sum having been paid in part payment of the price, and the sale not having been completed. At the trial in the superior court, before *Rockwell, J.*, a verdict was returned for the plaintiff, upon facts and rulings which are sufficiently stated in the opinion; and the defendant alleged exceptions.

*A. Jackson*, for the defendant.

*G. W. Searle*, for the plaintiff.

DEWEY, J. No doubts seem to exist as to the liability of the auctioneer to the vendee for money paid by him at an auction in the ordinary course of business, as a deposit required by

the terms of the sale, where the vendor has failed to complete the conveyance. As to the deposit money, he may be treated as a stakeholder between the parties, and liable as such. *Burrough v. Skinner*, 5 Burr. 2639. *Edwards v. Hodding*, 5 Taunt. 815. *Harrington v. Hoggart*, 1 B. & Ad. 577. *Gray v. Gutteridge*, 1 Man. & Ry. 614.

But assuming that the auctioneer is liable, may not the vendor also be liable to the vendee for the deposit money, when the same has not been repaid to the latter, and the sale has failed to be completed through want of title, or other default of the vendor?

The auctioneer is the agent of the vendor. The vendor selects him, and through him invites the purchaser to make his proposals, or bid, and to pay such sum as advance money as the vendor may have prescribed. The case has the ordinary elements of an agency.

The doubt as to the liability of the vendor seems to arise from the character which has been fixed upon the auctioneer, by numerous decisions, as a stakeholder of the deposit money. But although a stakeholder in a qualified sense, and as such liable to be personally called upon for the money, if not duly paid over to the party entitled to it, yet his relation to the vendor is something more than that of an ordinary stakeholder originally selected by the concurrent act of both parties as a depository. Here the vendor irrespective of the other party selects whom he will as his selling agent, and makes the conditions of sale, and fixes the sum to be paid by the vendee in advance as purchase money. These conditions being wholly regulated by the vendor, as well as the selection of his auctioneer, it would seem reasonable that he should be held to the responsibility of a principal, as respects the repayment of the deposit money, as well as for any other damages to which the other party may become entitled by reason of failure to make the proposed conveyance.

It is said in Chit. Con. (10th Amer. ed.) 332, that "if the seller violate the agreement on his part, either by omitting to show a good title in due time, or by refusing to execute the conveyance, the vendee may maintain an action against the

auctioneer to recover the deposit; but not the expense or interest; or against the vendor to recover the deposit and interest." Again on page 337: "The auctioneer is liable only for the amount of deposit without interest. The vendor is in general responsible, not only for the deposit, but for interest thereon."

The adjudicated cases often state this distinction, and the liability of the vendor in terms corresponding to the above. Actions have frequently been maintained against the vendor, usually, however, accompanied by some claim for special damages. *Flureau v. Thornhill*, 2 W. Bl. 1078. *De Bernales v. Wood*, 3 Camp. 258. *Sampson v. Rhodes*, 8 Scott, 544. We do not find any case where the contrary doctrine has been held, except that of *Johnson v. Roberts*, 30 Eng. Law & Eq. R. 234, where it is said that the court held that the auctioneer is alone liable to a purchaser for the deposit money, even though he may have paid it over to the vendor. As to this case, it is somewhat remarkable that it is not found reported in the regular series of reports. As an authority, upon a close scrutiny of the case, it will be found that it may be limited to a question of pleading rather than a case decided upon the broader ground of right to recover generally. We are not satisfied to adopt it, seemingly variant as it is with the principle so generally stated, that the purchaser may resort to the vendor for deposit and interest.

Upon general principles, it would seem that the auctioneer may be considered as so far the agent of the vendor that the latter may be charged in an action for the deposit money and interest thereon, where the bargain fails to be consummated by reason of the failure of title in the vendor, or neglect to make the conveyance, and no circumstances exist showing that the vendee had elected to rely upon the auctioneer.

But we think the facts of this case present stronger grounds for charging the vendor than ordinary sales at auction might do. The sale was a single sale made on the premises sold, preceded by a public notice in the form of a handbill advertising this particular house to be sold, and stating that "\$100 was to be paid at the time and place of sale."

In the written conditions drawn up on the day of the sale

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and stating more fully the terms of payment, and restating the condition that "\$100 is to be paid at the time and place of sale," the signature thereto is "Geo. R. Hichborn, Auctioneer and Agent for the owner." The receipt given to the plaintiff for the payment of the \$100 is in these terms: "Received of Thomas Teaffe one hundred dollars in part payment of house No. 13 Lowell St. purchased by him at auction this day. Geo. R. Hichborn, Auctioneer and Agent for the owner," indicating that it was paid as a part of the purchase money, as well as that the auctioneer was agent for the owner. The facts further show that this payment of \$100 was made by the plaintiff in the presence of the owner of the house, on a demand by the auctioneer "of a part payment towards the purchase money, of \$100."

It is admitted that the sale of the house to the plaintiff was never perfected, and that the plaintiff was not bound to take a deed thereof from the defendant, by which we understand that there was an inability or default on the part of the defendant to perform his contract for the sale of the house.

Under these circumstances, the court are of opinion that the presiding judge properly refused to instruct the jury that the plaintiff could not maintain this action against the defendant. The further ruling that if the money was paid as a deposit the action could not be maintained furnishes the defendant no ground for exception, inasmuch as, if it was erroneous, it was too favorable to him.

*Exceptions overruled.*

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JANE M. GAY vs. RUFUS B. KINGSLEY.

An indorsement of a promissory note by a husband to his wife will not vest in her a valid title to it; and if he has afterwards gone into insolvency, and then died, and the assignee in insolvency has had no knowledge of the existence of the note, and has never authorized an action to be brought thereon, she cannot maintain an action to recover the same as administratrix of his estate. And proof that the debtor duly filed schedules of his assets and creditors, which have since been lost, and took the debtors' oath required by law, is not sufficient to show that the assignee had such knowledge.

CONTRACT upon two promissory notes signed by the defendant and payable to James Gay or order. The controversy here



was only upon one of the notes, which was for \$889, dated January 9th 1849, payable in thirty days after date, and attested by a subscribing witness. The plaintiff was administratrix of the estate of James Gay, and the declaration simply alleged that the defendant made the note, (setting out a copy,) and that he owed the amount thereof with interest.

At the trial in the superior court, before *Morton, J.*, the plaintiff introduced evidence tending to prove the making and delivery of the note by the defendant to her intestate. No payment was ever made thereon. The defendant introduced evidence to show that the plaintiff went into insolvency in 1853; that an assignee was appointed, who received no assets, and had never given to the intestate or the plaintiff any authority to act for him in regard to this note; that schedules of the debtor's assets and creditors were filed, but had been taken from the files by the assignee, leaving a receipt, as was customary at that time that the defendant was then perfectly solvent, and had an office in Boston; that the debtor took the debtor's oath, required by law; and that he had gone to the war three or four years ago, had not returned, and no one had charge of his business in Boston, where he had previously resided.

The plaintiff then offered evidence to show that in 1851 or 1852 the note was given by James Gay to her as a present, moving directly from him to her, by delivery, it being then indorsed by him; that she retained it till 1858, when she lent it to him and he pledged it as security for a loan of money, a part of which he gave to her, and the pledgee had returned it to her counsel after her husband's death for the purpose of having it sued, with the understanding that he should receive the amount of his claim out of the judgment.

The defendant then requested the court to instruct the jury, upon the pleadings and evidence, that if anything was due from the defendant upon the note, the assignee could sue for it in his own name; and that if they should find that the assignee had never in fact received the note, nor had notice of its existence, and that he had not authorized the intestate or the plaintiff to act on his behalf in regard to the note, or in bringing this action,

then the plaintiff was a mere naked depositary of the note, and this action could not be maintained in her name.

The judge declined so to instruct the jury, but ruled upon this part of the case that the evidence in the case did not establish a defence of which the defendant could avail himself, provided the jury were satisfied that the note was given upon a sufficient consideration, and had not been paid or otherwise discharged.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

*C. W. Storey*, for the defendant, cited *Smith v. Chandler*, 3 Gray, 392; *Johnson v. Neale*, 6 Allen, 228; *Slawson v. Loring*, 5 Allen, 340; *Pitts v. Holmes*, 10 Cush. 92; *Davis v. Newton*, 6 Met. 542; *Conkey v. Kingman*, 24 Pick. 115; *Sherwood v. Roys*, 14 Pick. 172.

*J. L. English*, for the plaintiff. The defendant cannot set up a title of the assignee in insolvency, who makes no claim. *Hallett v. Fowler*, 8 Allen, 93. *Fogg v. Willcutt*, 1 Cush. 300. *Sawtelle v. Rollins*, 23 Maine, 196. Where the assignee intervenes it is different. *Smith v. Chandler*, 3 Gray, 392. *Kitchen v. Bartsch*, 7 East, 53. The assignee has an election whether to take or waive his title to a part of the assets. 1 Deac. Bankr. 340. *Fogg v. Willcutt*, above cited. *Smith v. Gordon*, 6 Law Reporter, 313. The only interest Gay had in the note at the time of his insolvency was a husband's right to reduce it to possession. His prior gift to his wife was good except as against creditors. *Fisk v. Cushman*, 6 Cush. 24. *Turner v. Nye*, 7 Allen, 181. *Slawson v. Loring*, 5 Allen, 340. It being a wife's chose in action, she was entitled to her provision out of it if the assignee claimed it. *Davis v. Newton*, 6 Met. 537. The assignee may well have doubted as to this note, and elected not to take it. After so long a time, the presumption is that he did his duty, and it is too late for him to claim it now. *Smith v. Gordon*, and Deac. Bankr., above cited. The schedules filed gave him full notice. The title of the pledgee is good as against everybody but the assignee. *Drayton v. Dale*, 3 D. & R. 534.

CHAPMAN J. By the common law, a husband and wife could not contract with each other, and our recent statutes relating to

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the property and rights of married women have made no change in this respect. *Lord v. Parker*, 3 Allen, 129. *Edwards v. Stevens*, Ib. 315. *Ingham v. White*, 4 Allen, 412. In the case of *Slawson v. Loring*, 5 Allen, 340, the remark of the court that the title to the note passed to the wife by the indorsement of the husband during coverture was not intended to imply that a husband could make a valid contract of indorsement with his wife. The remark is to be taken in connection with the whole case, by which it appeared that she acted merely as his agent, and that by the indorsement to her, and by her to Dupee, Beck & Sayles, it was intended that she should be a mere conduit in passing the title of the note to them, for the benefit of the plaintiff, and as his agent, she never pretending to have any interest in the transaction.

But in the present case the husband, being the payee of the note, indorsed it, and delivered it to his wife as a present. It remained his note in her hands as completely as ever, and her possession was his possession. This was in 1851 or 1852; and when his assignment in insolvency was made in 1853, the legal title to the note passed thereby to his assignee. *Smith v. Chandler*, 3 Gray, 392. By the case last cited it is decided that if the note had been made payable to the wife, the assignment would constitute a valid defence to the action, if the assignee should claim the note. If he had knowledge of its existence he might not be obliged to claim it; and if he declined to do so, the insolvency might not be a valid defence. *Hallett v. Fowler*, 8 Allen, 93. But this case is different. It does not appear that the assignee had knowledge of the existence of the note in suit, and he or any new assignee to be appointed in the case has the legal right to collect it. As a general rule, the defendant cannot set up a title in a third person, in defence to an action upon a note like this, which the plaintiff holds and produces in court, there being no fraud proved. *Fogg v. Willcutt*, 1 Cush. 300. The plaintiff has the title against all persons except the assignee, and may enforce it if the assignee does not intervene. *Clark v. Calvert*, 3 Moore, 96. But if the plaintiff and her husband concealed all knowledge of the existence of the note from the

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assignee, he could not have assented to their retaining the possession of it. The legal title was in him, and their possession gave them no more title to the note than if he had lost it, and they held it as mere finders. Certainly they could have no better title than if they were his depositaries, and as such they could not maintain an action upon the note. *Sherwood v. Roys*, 14 Pick. 172. In order to maintain this action as administratrix the plaintiff must satisfy the jury that her husband held the note either as trustee of the assignee or as his own property. He might hold it as his own if the assignee, with knowledge of its existence, declined to claim it. But if it has been secretly withheld from the assignee, it has been held fraudulently.

*Exceptions sustained.*

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#### HENRY H. ANDREWS vs. JEREMIAH LYONS.

In order to create an estoppel *in pais*, the declarations or acts relied upon must have been accompanied by a design to induce the party who sets up the estoppel to act upon them.

CONTRACT upon a promissory note for \$122.47, dated September 25th 1861, payable to the order of the maker in forty-five days after date, and by him indorsed in blank. The answer alleged that the note was given for intoxicating liquors sold in violation of law, and that the plaintiff was not the owner of it, but that it belonged to the assignee in insolvency of Chamberlain & Waugh.

At the trial in the superior court, before *Ames, J.*, it appeared that the note was given to Chamberlain & Waugh, for intoxicating liquors sold in violation of law; that they went into insolvency in January 1862; that at some time in 1862 Waugh offered the note for \$115 to the plaintiff, who before closing the bargain showed it to the defendant and inquired whether it was "all right," to which the defendant replied, "Yes, it is all right; I shall pay it soon." The assignee in insolvency authorized this suit to be prosecuted by the plaintiff.

The judge instructed the jury that the possession of the note

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was *prima facie* evidence of title in the plaintiff, and would *prima facie* authorize the plaintiff so to fill up the indorsement as to make it payable to himself, and would be sufficient proof of title in the plaintiff, unless it were shown affirmatively that the assignee claimed the note adversely to the plaintiff; and that if the plaintiff, before purchasing the note, received from the defendant what could reasonably and fairly be understood as an assurance that it was a lawful, valid and binding note, and would be paid without objection, and if the plaintiff was induced by that assurance to become the purchaser of the note, the defendant would thereby be estopped to set up against the plaintiff the defence of illegality in the consideration of it.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

*L. M. Child*, for the defendant.

*B. Dean*, for the plaintiff.

COLT, J. The possession of a promissory note payable to bearer, or of a note payable to the maker's order and by him indorsed in blank, which makes it in legal effect a note payable to bearer, is sufficient *prima facie* evidence of the plaintiff's title to sue thereon. And the ruling of the court upon this point was correct. *Pettee v. Prout*, 3 Gray, 502. *Way v. Richardson*, Ib. 412.

But the defendant requested the court to rule that he was not estopped, upon the evidence produced, from setting up the illegality of the consideration of the note. This request was refused, and such instructions were given as authorized the jury to find that the defendant was so estopped. And we think the defendant's exceptions to this refusal and to the instructions given on this point are well taken.

The modern doctrine on this subject of estoppels *in pais* is thus stated by Lord Campbell, in *Howard v. Hudson*, 2 El. & Bl. 10: "If a party wilfully makes a representation to another, meaning it to be acted upon, and it is so acted upon, that gives rise to what is called an estoppel. It is not quite properly so called; but it operates as a bar to receiving evidence contrary to that representation, as between those parties. Like the

ancient estoppel, this conclusion shuts out the truth, and is odious, and must be strictly made out. The party setting up such a bar to the reception of the truth must show that there was a wilful intent to make him act on the faith of the representation, and that he did so act."

The law is thus stated, in affirmation of the decision in *Pickard v. Sears*, 6 Ad. & El. 469, and *Freeman v. Cooke*, 2 Exch. 663. And the law of these cases has been adopted and approved in the decisions of this court. *Coggill v. Hartford & New Haven Railroad*, 3 Gray, 549. *Osgood v. Nichols*, 5 Gray, 420. *Audenried v. Betteley*, 5 Allen, 384. *Plumer v. Lord*, 9 Allen, 455. *Langdon v. Doud*, 10 Allen, 437.

Applying this doctrine to the facts disclosed in this case, it will be seen that there is no evidence that the defendant, at the time he made the statements which it is insisted that he is concluded from denying, had any knowledge that the plaintiff intended to act upon the statements made in purchasing the note, or otherwise changing his position in regard to it. There is nothing in the evidence inconsistent with a belief on the part of the defendant, at the time he made the alleged statements in regard to the validity of the note, that the plaintiff was then the owner of it, or was acting as agent to obtain information for the assignees of the payees of it. The proof therefore entirely fails to establish the important element of knowledge and intent, on the part of the defendant, that the representation was to be acted on by the plaintiff. Estoppels are not favored in law, and everything necessary to establish them must be strictly made out in evidence.

The instructions to the jury are objectionable in authorizing them to find for the plaintiff in the absence of evidence which upon the law as above stated was necessary to make the statements of the defendant in regard to the note conclusive upon him.

*Exceptions sustained.*

## HENRY HEIMS vs. WILLIAM S. RING.

Since the enactment of Gen. Sts. c. 156, § 5, if the plaintiff in an action of trespass to real estate, commenced originally in the superior court, recovers less than twenty dollars as damages, he will be entitled to no costs, unless the judge shall certify, under *St. 1862, c. 36* that the title to real estate was in fact concerned.

TORT in the nature of trespass *quare clausum*, brought originally in the superior court by writ dated July 22d 1864. At the trial before *Brigham, J.*, without a jury, the plaintiff recovered fifteen dollars damages. The judge disallowed costs, and the plaintiff appealed to this court.

*T. Willey*, for the plaintiff.

*A. W. Boardman*, for the defendant.

DEWEY, J. Prior to the Gen. Sts. c. 156, § 5, in a case like the present, the plaintiff would, under the well settled rules of this court, have been entitled to tax full costs.

Under the various earlier statutes the limited jurisdiction of justices of the peace in actions of trespass upon real estate, and the nature of the action as one that might probably involve a question of title to real estate, led the court to hold that the commencement of the same in the higher court did not prevent the plaintiff from recovering his full costs, although the damages recovered did not exceed the jurisdiction of a justice of the peace. The Rev. St. c. 121, § 3, recognized actions of trespass upon real estate as personal actions, and expressly excepted them from the general rule of allowing costs not exceeding one fourth the amount of damages, where the damages were less than twenty dollars.

The Gen. Sts. c. 156, § 5, have materially changed the law on this subject. The clause in the Rev. Sts. c. 121, § 13, excepting actions of trespass upon real estate from the general rule applicable to personal actions as to costs where the damages recovered were less than twenty dollars in an action originally instituted in the superior court, was wholly stricken out.

This made the provision as to costs alike applicable to all personal actions. We must suppose it to have been so designed

by the commissioners who reported the same, and by the legislature who adopted it. The Gen. Sts. c. 120, § 1, have enlarged the jurisdiction of justices of the peace in this class of cases, giving to them exclusive original jurisdiction in all actions of tort, where the damages demanded do not exceed twenty dollars, and thus in that respect assimilating them to other personal actions. The Gen. Sts. c. 156, § 5, have excepted actions of replevin only from the general rule as to costs in personal actions.

That the action of trespass upon real estate was not a personal action in the well known common law distinction of personal and real actions has never been suggested by the court. It was upon other grounds that full costs were allowed in such actions. But those reasons have ceased to exist under the Gen. Sts. The legislature, aware of this change, and deeming it too sweeping in its effects, as it would in all cases of actions originally commenced in the superior court deprive the party of his full costs if the damages were less than twenty dollars, although the title to real estate did in fact come in question, by *St. 1862, c. 36*, have provided that, in all cases in which the title to real estate may be concerned, the party prevailing shall recover his full costs, without regard to the amount of damages recovered, provided "the title to real estate shall in fact be concerned in the particular case, and the judge before whom the cause is tried shall certify such to be the fact."

The defendant insists that this statute was particularly designed to apply to other cases of trespass, such as those upon the person, or goods and chattels, where the right of the parties might depend upon the title to real estate, and therefore no argument arises for its supposed necessity, in reference to trespass upon real estate, from the fact of its enactment.

In the opinion of the court, it embraces the latter as well as the former, and was intended as a general provision regulating costs in personal actions when the title to real estate shall in fact be concerned.

But the statute has not only provided as to the particular facts required to entitle the party to full costs, but also as to the mode of proof of those facts, making it necessary that the



judge before whom the cause is tried shall certify as to the same. This necessarily prevents the drawing of inferences as to whether the title was in question from the form of the declaration, or the facts originally stated in the answer, and leaves the fact whether the title to real estate was actually concerned to be shown by the certificate of the judge who tried the case.

This leaves the party who institutes an action of trespass upon real estate to select the proper tribunal as the court of original jurisdiction, having regard to the amount of his claim for damages, and being attended with the like penalties as to his costs that attach to actions of trespass upon the person or upon the goods of the party.

He may avoid all risk as to costs by instituting his suit, where the actual damages are of small amount, before a justice of the peace, with full power to remove the case to a higher court if the title to real estate is put in issue.

Wherever commenced, if the title to real estate shall in fact be concerned, as shown on the trial, upon a certificate of the judge to that effect, the plaintiff will, if he is the prevailing party, recover full costs.

*Exceptions overruled.*

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### WILLIAM H. HOOTON vs. SAMUEL GAMAGE & trustee.

If a debtor who has been arrested puts property into the hands of his bail to secure him for his liability on the bail bond, and the bail is then summoned as trustee in a trustee process brought against the debtor by another creditor, the plaintiff in such trustee process is entitled to have the liability of the trustee determined in that process, although it appears that the trustee has been sued on the bail bond.

**TRUSTEE PROCESS.** At the trial in the superior court, before Lord, J., it appeared that at the time of the service upon the supposed trustee he held certain property which had been put into his hands by the defendant as security for his liability as surety for the defendant on a bail bond given in a suit in which the defendant had been arrested. After the service of the

trustee process, the trustee surrendered the defendant, who thereupon took the poor debtor's oath ; but the creditor insisted that the proceedings were irregular, and brought an action against the trustee on the bail bond, which was and is now pending. The judge ruled that the question of the trustee's liability on the bail bond could not be tried in this case, and refused to charge the trustee. The plaintiff then requested the court to pass an order for him to perform what the trustee under the bail bond was bound to perform. The judge asked in what mode he would have performance ordered ; and the plaintiff proposed no mode. The judge declined to pass such an order. The plaintiff alleged exceptions.

*D. C. Linscott*, for the plaintiff.

*J. D. Howe*, for the trustee.

BIGELOW, C. J. We can see no legal reason for the refusal of the court to determine whether the personal property belonging to the defendant in the hands of the trustee was held by him subject to a valid lien or pledge. The fact that at the time of the service of process on the trustee he held the property as collateral security for his liability on a bail bond, in which he was surety for the defendant, did not operate to prevent it from being held by attachment on the writ in this suit. By Gen. Sts. c. 142, §§ 55, 56, property so situated is expressly made subject to attachment on trustee process.

The suit was therefore properly brought, and it was the right of the plaintiff to ask of the court that any issue properly raised in the case should be tried and determined. Such an issue was raised by the answer of the trustee, by which he set up the right to hold the property in his hands as subject to a valid pledge or lien. If a pledge or lien was found to exist, then it was incumbent on the court to determine whether the attaching creditor could be allowed to hold the property by furnishing other and satisfactory security to the trustee for his liability on the bail bond, or otherwise saving him harmless thereon. But if no pledge or lien existed on the property at the time of the service of process, or if it had been released and discharged in any way after service and pending this action, then it was the clear right

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of the plaintiff to hold the property by his attachment, and to ask that the trustee should be charged therefor. In either aspect, the question of the existence of the pledge or lien was directly in issue, and on its determination the right of the plaintiff to hold the property on his attachment, absolutely or conditionally, essentially depended.

The only reason suggested for the refusal of the court to decide this issue is, that there was then another suit pending for breach of the conditions of the bail bond, in which the question of the liability of the trustee as surety was at issue between him and the original plaintiff in the action in which the bond was taken. But we do not see that this fact affords any legal ground for a refusal to try an issue which was properly raised and before the court for determination in this action; certainly not, when no facts are shown which render it difficult or impracticable to adjudicate on the matters involved in the issue. The parties in the two actions are not the same, nor are the issues identical. It is true that a decision in the suit on the bail bond, if rendered without fraud or covin, might have a direct and essential bearing on the right of the trustee to hold the property in his hands subject to the pledge. But the plaintiff is not a party to that suit, nor can he be bound by the judgment which may be rendered in it. He has a right to insist that the issue raised in the present case should be adjudicated. If the right to hold the property in the hands of a trustee depends on some collateral fact, that fact may be determined in the trustee suit, notwithstanding it may be also the subject of controversy, or be involved in the issue depending in another action between other parties. If such be not the rule, then we are unable to see any limit which can be put to the delay in determining an issue like that raised in the case at bar. The plaintiff would have no means within his reach of obtaining an adjudication, because he could not control or influence proceedings to which he was not a party.

If it be said that the trustee would be exposed to the risk of injury or loss by requiring him to litigate in this suit the question of his liability as surety on the bond, because different

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adjudications might be had on the same question in the two actions, the answer is, that he can always address the discretion of the court to obtain a delay of one action until another, involving a similar issue, is determined. But this is a different proposition from that which is insisted on in behalf of the trustee in this action, which involves in substance an absolute denial of the rights of the plaintiff to be heard at all until another case is tried and determined.

*Exceptions sustained.*

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JOHN M. WAY vs. JOHN L. DAME & others & trustees

An action of tort in the nature of trespass *quare clausum fregit* is a personal action and may be commenced by trustee process, returnable in the county where the trustee lives, although that is not the county where the land is situated.

**TRUSTEE PROCESS.** The declaration was in tort, alleging a trespass to the plaintiff's real estate situated in Roxbury in the county of Norfolk, with personal injuries to himself. Several persons were summoned as trustees, all of whom had a usual place of business in Boston, in the county of Suffolk; and the writ was returnable to this court in Suffolk county. The defendants moved to dismiss the action on the ground that it should have been made returnable in Norfolk county, and that an action for the cause alleged could not be commenced by trustee process; and these questions were reserved by *Hoar, J.*, for the determination of the whole court.

*E. M. Bigelow*, for the plaintiff. All personal actions may be commenced in this form, with certain exceptions enumerated in the statute, and are returnable in the county where the trustee has his place of business. Gen. Sts. c. 142, §§ 1, 4. *St. 1794, c. 65, § 1. Lewis v. Denney*, 4 Cush. 588. *Brown v. Webber*, 6 Cush. 563. These provisions apply to this action, although it was local by common law. *Crushing's Trustee Process*, 129. *Replevin* is local. *Robinson v. Mead*, 7 Mass. 353. So is an action

for rent. Yet it was thought necessary to except replevin specially in the statute, and no one ever doubted that actions for rent might be brought by trustee process. *Thursby v. Plant*, 1 Saund. 241 *b*, n. 6. *Patten v. Deshon*, 1 Gray, 326. The term "personal actions" is used in a uniform sense in our statutes. Gen. Sts. c. 3, § 7; c. 18, § 61; c. 126, §§ 1, 8, 12, 16, 17; c. 127, §§ 1, 2, 5, 13; c. 129, §§ 1, 2, 6, 13, 70, 84; c. 147, §§ 1, 3; c. 156, § 5; c. 157, § 4. The propriety of bringing the action in this form was recognized by Sedgwick, J., in *Wilder v. Bailey*, 3 Mass. 291.

*J. Q. A. Griffin & J. W. May*, for the defendants. The action of trespass *quare clausum* is local by all the authorities, ancient and modern. It is not a personal action, within the meaning of Gen. Sts. c. 142, § 1. It has been classified, regarded and treated as a real action, by the legislature, by courts and by text writers. Sts. 1817, c. 185; 1820, c. 79. *Davis v. Mason*, 4 Pick. 158. *Blood v. Kemp*, 1b. 169. *Plympton v. Baker*, 10 Pick. 473. *Sawyer v. Ryan*, 13 Met. 144. 1 *Trials per pais*, 124. 1 Bac. Ab. Actions Local and Transitory, A. And personal actions are subdivided into local and transitory. See Gen. Sts. c. 123, §§ 1-8. *Clark v. Scudder*, 6 Gray, 122. The venue of local actions is determined by the place of the cause of action. The trustee process applies only to those personal, transitory actions, the venue of which is not controlled by the general principles of the common law.

COLT, J. By Gen. Sts. c. 142, §§ 1, 4, all personal actions may be commenced by trustee process, except actions of replevin, actions of tort, for malicious prosecution, slander, and assault and battery; and the writ in such case shall be returnable in the county where the trustees or some of them reside or have their usual places of business.

Trespass *quare clausum* is unquestionably a personal action within the common law definition, and although a local action yet if the term "personal actions" in the trustee act is to receive the ordinary technical meaning, there can be no doubt that this action is properly brought in this county, where the trustees have their usual places of business.

The defendants contend that this action, though in form personal, is in fact a real action, and has been so classified and treated in the legislation and by the courts of this commonwealth; and that the words "personal actions" in this statute are to be interpreted with reference to such classification, so as to exclude trespass *quare clausum*. The first attempt at such new classification appears in *St. 1817, c. 185*, regulating appeals in personal actions; and it is there provided "that all actions of trespass shall, for the purposes of this act, be deemed and taken to be personal actions, excepting those in which the titles to real estate shall by the pleadings be brought into question." The *St. of 1817* was superseded by *St. 1820, c. 79*, in which a right of appeal is given to "any party aggrieved at the judgment of the court of common pleas in any real action, or any personal action." Under this statute, in *Davis v. Mason*, 4 Pick. 158, and *Blood v. Kemp*, 4 Pick. 169, trespass *quare clausum* was held to be a real action for the purposes of appeal; and Parker, C. J., in the case last cited, referring to *St. 1817*, says, "Although this statute is repealed, yet it seems to show a classification of these actions, in a popular sense, among real actions, which might be assumed as a basis for future legislation upon the subject."

In *Plympton v. Baker*, 10 Pick. 475, Shaw, C. J., in considering *St. 1820*, refers to *St. 1817*, and adds, "We are of opinion that in reference to other analogous statute provisions, and the judicial constructions upon those before cited, actions, though in form personal, which put in issue rights to real estate, are real actions within the meaning of this statute." It will be noticed that a strong ground for the construction thus given to *St. 1820, § 79*, is found in the fact that it is a substitute for *St. 1817*, incorporated into the general act establishing the court of common pleas, and intended as a reënactment of the last named statute.

The defendants contend, mainly on the strength of these decisions, that the term "personal actions" is not intended in the trustee act to include trespass to real estate. The statutes regulating the right of appeal have no necessary relation to those regulating the trustee process, and cannot be said to be *in pari*

*materia.* The doctrine that several acts having one object in view and constituting parts of one system are to be construed together can therefore have no application. There are numerous acts in relation to civil proceedings in which reference is had to personal actions in general terms. The position of the defendants would require them to maintain that in all such cases the legislature intended to exclude trespass to real property. Such a construction of § 1 of the practice act, for instance, would except this form of trespass from those personal actions which may be commenced by an action of tort.

But there is another answer to the defendants' claim, which seems decisive. If there is any force in the argument that the legislature intended to follow those legislative provisions and judicial decisions, which it is claimed have modified the common law definition of personal actions, it is plain that such modification must appear to have existed prior to the passage of the trustee act. The *St.* of 1817, as we have seen, discloses the first attempt at such distinction, while the provisions of Gen. Sts. c. 142, § 1, relating to trustees, had their origin as early as 1794, in c. 65, § 1, of the statutes of that year, the phraseology of this early statute with precisely the same exceptions being adopted in the Revised Statutes and continued in the General Statutes. There can be no pretence, therefore, that when this statute first became the law of the Commonwealth, the meaning of the words "personal actions," in their legal acceptation, had then been changed by lawgivers or judges. In *Wilder v. Bailey*, 3 Mass. 291, Sedgwick, J., discussing this statute of 1794, remarks that "goods, effects and credits, so intrusted and deposited, are attachable in various actions for torts, such as trover, &c., and even in actions of trespass *quare clausum fregit*."

We cannot see any reason, therefore, for not applying the ordinary rule that the words of a statute are to be taken in their ordinary signification, and technical words in a technical sense. The practical inconveniences which result from bringing actions of trespass upon real estate in counties where the parties do not reside, and remote it may be from the close in question, have existed for a long time, and if they have attracted the attention

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of the legislature, have not been considered serious enough to counterbalance the benefit afforded by the use of the trustee process, or require removal by an amendment of the law.

*Motion to dismiss overruled.*

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JOHN H. TROWBRIDGE vs. JOHN WETHERBEE, Jr.

A parol promise to pay to another a portion of the profits made by the promisor in a purchase and sale of real estate is not within the statute of frauds; and, if founded upon a sufficient consideration, will support an action.

CONTRACT brought to recover one third part of the profits made on the sale of certain real estate.

At the trial in the superior court, before *Morton*, J., the plaintiff offered parol evidence to show that in July or August 1860 he ascertained that one Tappan had for sale a piece of real estate in Roxbury, and that he negotiated for the purchase thereof, and caused the same to be conveyed by said Tappan, by a deed in the common form, to Louis S. Robbins, of New York; that Robbins furnished a part of the purchase money, and gave a mortgage for the balance of the consideration; that the defendant and Robbins were to furnish the means, manage and improve said property, and to sell the same to the best of their judgment, and of the net proceeds, over and above the costs of the said real estate, and the costs of said improvements, after deducting the rents and income received by them, one third was to be paid to each; the plaintiff was not to, and did not, furnish any money; and thereafter, to wit, October 9th 1861, with the consent of the plaintiff, Robbins, by a deed in the common form, transferred said real estate to the defendant; that the defendant, at the delivery of the deed to him, repaid to Robbins all the money advanced by Robbins towards the said real estate and improvements; that the defendant then agreed, by parol, that Robbins's deed to him should not affect the



plaintiff's right to one third of the net proceeds as aforesaid, and that the defendant should take and manage said real estate, and sell the same to the best of his judgment; and of the net proceeds of such sale over and above the cost of said estate, and of the improvements, after allowing for the rents and income received therefrom, pay one third to the plaintiff. The plaintiff also offered evidence to show that in March 1863 the defendant conveyed the said real estate to one Mayall; that the same, together with other property, was conveyed to said Mayall in settlement of a disputed claim which he held against the defendant; and that in such settlement the parties estimated and treated this real estate as of the value of seven thousand dollars over and above the cost thereof, and of improvements thereon, and the plaintiff claimed one third of such excess, and duly demanded the same.

The agreement between said parties was not in writing. The plaintiff claimed to have executed his part of said agreement, in having negotiated for and furnished the property, and that he was to have the said one third of said excess in consideration thereof. But the judge ruled that the plaintiff's action could not be maintained, and refused to admit the evidence. The plaintiff alleged exceptions.

*T. Willey & C. S. Lincoln*, for the plaintiff, in addition to some of the cases cited in the opinion, cited *Brackett v. Evans*, 1 Cush. 82; *Pierce v. Woodward*, 6 Pick. 206; *Wilby v. Phinney*, 15 Mass. 121; *Pomeroy v. Winship*, 12 Mass. 523.

*A. A. Ranney & H. W. Suter*, for the defendant. The case of *Smith v. Burnham*, 3 Sumner, 458, shows that the plaintiff cannot recover on the ground of a contract by which the defendant and Robbins were to pay for the estate which he had procured for them, his procurement constituting his contribution to the joint enterprise, and by which his interest was to be in the net profits, but not in the land itself. There is no evidence of a partnership between the parties. If there were, the matter in dispute could only be determined in equity; and an agreement for a partnership which is not in writing is within the operation of the statute of frauds. *Fall River Whaling Co. v.*

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*Borden*, 10 Cush. 458. *Gray v. Palmer*, 9 California, 639. The law applicable to this case is fully discussed in *Smith v. Burnham*, which has been recognized in *Richards v. Richards*, 9 Gray, 315; *Montague v. Hayes*, 10 Gray, 609; *Fall River Whaling Co. v. Borden*, above cited.

CHAPMAN, J. It appears by the bill of exceptions that the plaintiff had discovered that there was in Roxbury a tract of land for sale at a price which he thought advantageous to the purchaser, and he believed that some money could be made by buying it to sell again. He therefore agreed with Robbins and the defendant that they should take a conveyance of the land to themselves, pay a part of the purchase money, and give a mortgage to secure the balance; that the property should be managed, improved and sold by joint arrangement of the parties, and after it was sold the net proceeds should be equally divided between them. The purchase was accordingly made. The plaintiff furnished no money in the transaction, but contributed his knowledge, skill and services. Whether on account of this contribution he had an interest in the property by way of resulting trust, need not be considered.

On the 9th of October 1861, Robbins, by consent of the plaintiff, sold out his interest to the defendant. As a part of the consideration of this transfer, the defendant agreed to become responsible to the plaintiff for his third part of the net profits. Both these agreements with the plaintiff were by parol. In March 1863, the defendant sold and conveyed the land for a certain price, and the plaintiff brings this action to recover his one third part of the net profits. The defendant insists that parol evidence is inadmissible to maintain this action under the statute of frauds. The objection is not that the contracts were not to be performed within one year from the time of making them, for it is obvious that they were capable of being performed within that time, and therefore they are not within the clause of the statute relating to such contracts. *Peters v. Westborough*, 19 Pick. 364. *Lyon v. King*, 11 Met. 412. But the objection is that they relate to the sale of lands, or of an interest concerning lands.

The defendant's promise was a part of the consideration for which he obtained his deed, and it does not follow as matter of course that an agreement to pay a consideration for a conveyance of land is within the statute. A promise to pay money presently as such consideration is not within this clause of the statute, while a promise to convey lands as a consideration is within it. *Basford v. Pearson*, 9 Allen, 387. In this case, the defendant did not agree to convey any part of the land to the plaintiff, but to sell and convey it to some other person and pay the plaintiff his share of the net proceeds in money. The first part of this promise, namely, the promise of the defendant to sell the land, was within the statute, and, if he had refused to sell, the plaintiff could not have maintained an action to enforce the promise to sell. According to the case last cited, he might in such case treat the consideration as having failed, and recover such amount as he could prove the consideration to be worth. For the purpose of proving the failure, he might have proved the parol agreement to make the sale. But the promise to sell has been performed, and when a promise which was within the statute has been performed, the contract is no longer within the statute. *Stone v. Dennison*, 13 Pick. 1. *Browne on St. of Frauds*, § 116. If some of the stipulations in a contract are within the statute and others are not, and those which are within it have been performed, an action lies upon the other stipulations, if they are separate. *Page v. Monks*, 5 Gray, 492. The effect of the statute is not to make a contract void, but to prevent the bringing of an action for the non-performance of a promise which is within it, or for the specific performance of such a promise. But a party who actually performs a promise which is within the statute has thereby waived the benefit of the statute.

The cases of *Smith v. Burnham*, 3 Sumner, 435, and *Dale v. Hamilton*, 5 Hare, 369, which are cited and commented upon in *Fall River Whaling Co. v. Borden*, 10 Cush. 458, and which are adverse to each other, have been cited in this case. But they were suits in equity to enforce specific performance; and in *Smith v. Burnham* Mr. Justice Story admits that they are unlike

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such a case as this. He cites the case of *Bunnet v. Taintor*, 4 Conn. 568, which is a case like this, and upon the authority of which this action may be maintained, and remarks that it did not turn upon the point raised in the case before him. It was an action at law for an account of the profits of an estate after it had been sold by the defendant, and the action was maintained. The court held that, as the estate had been sold, the statute of frauds did not apply to the case. In *Smith v. Watson*, 2 B. & C. 401, it was held that a right to share in the profits of a particular adventure did not give the party any interest in the property itself which was the subject matter of the adventure. If we apply that doctrine to this case, the plaintiff never had any interest in the land itself which was the subject matter of this adventure. If we regard the parties as in any sense copartners, then the whole business is closed, there are no outstanding debts or duties, and an action of contract lies to recover a final balance. *Brinley v. Kupfer*, 6 Pick. 179.

*Exceptions sustained.*

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ALVIN DEXTER vs. WILLIAM E. BLANCHARD.

No action lies upon an oral promise by a father to pay his minor son's debt, not contracted for necessities, although the promise was made in consideration of the creditor's forbearing, at the father's request, to demand the same of the son.

CONTRACT brought upon an oral promise by the defendant to pay to the plaintiff a bill for the hire of horses and carriages, and for injury to a wagon.

At the trial in the superior court, before *Morton, J.*, the plaintiff offered to prove that the horses and carriages were hired and the injury done by the defendant's minor son, to whom the credit therefor was given; and that not long after the date of the last charge the defendant's son became sick, and while so sick the plaintiff several times demanded payment of him, and thereupon the defendant verbally promised to pay the plaintiff's bill

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if the plaintiff would not trouble his son any further ; to which the plaintiff agreed. The son afterwards died. It was admitted that the bill was not for necessities.

The judge ruled that upon these facts the action could not be maintained, and a verdict was returned accordingly for the defendant. The plaintiff alleged exceptions.

*E. L. Sherman*, for the plaintiff.

*W. Brigham*, for the defendant.

BIGELOW, C. J. The ruling of the court was in accordance with well established principles. The defendant's promise, although it may have been made on a good consideration as to the plaintiff, was nevertheless a promise to pay the debt of another, and no action can be maintained upon it. Gen. Sts. c. 105, § 1. The fallacy of the argument urged in behalf of the plaintiff lies in the assumption that there was in fact no debt due from the son of the defendant, because he was a minor at the time he undertook to enter into a contract with the plaintiff. A debt due from a minor is not void ; it is voidable only ; that is, it cannot be enforced by a suit at law against the contracting party, on plea and proof by him of infancy. But it is voidable only at the election of the infant, and until so avoided it is a valid debt. Nor can a third person avail himself of the minority of a debtor to obtain any right or security or title. Infancy is a personal privilege, of which no one can take advantage but the infant. *Kendall v. Lawrence*, 22 Pick. 540. *Nightingale v. Withington*, 15 Mass. 274. *McCarty v. Murray*, 3 Gray, 578.

The effect of the doctrine contended for by the counsel for the plaintiff would be that a verbal agreement to answer for the debt of another would be valid, if it could be shown that the original contracting party could have established a good defence to the debt in an action brought against him. We know of no principle or authority on which such a proposition can be maintained. It certainly would open a wide door for some of the mischiefs which the statute of frauds was designed to prevent.

The case for the plaintiff derives no support from the argument based on proof of an agreement by the plaintiff to forbear to sue the defendant's son, in consideration of the promise of

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the latter to pay the debt. It is perfectly well settled that it is not a sufficient ground to prevent the operation of the statute of frauds, that the plaintiff has relinquished an advantage or given up some lien or claim in consequence of the defendant's promise, if that advantage or relinquishment did not also directly enure to the benefit of the defendant. It is only when such relinquishment or surrender operates to transfer to the defendant the right, interest or advantage which the plaintiff gives up, or to create in the defendant some title or benefit derived from that which the other party surrenders, that the promise can be regarded as an original undertaking, and not within the statute *Curtis v. Brown*, 5 Cush. 488, and cases cited.

*Exceptions overruled.*

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**JAMES P. BUSH & others vs. SAMUEL BALDREY.**

Gold dollars of United States coin, if applied towards the payment of a debt, without any special contract as to the rate at which they are to be taken, cannot be treated as having any greater value than any other currency which is a legal tender for the payment of debts; and English sovereigns, if applied towards the payment of a debt, are to be computed according to the real par of exchange, that is, having reference to the gold coin of the United States.

**CONTRACT.** The declaration contained one count upon an account annexed, in which the items upon the debit side were all for money; and one count for money had and received.

It was agreed in the superior court that the report of H. W. Paine, to whom the case had been referred as auditor, should be taken as a statement of facts, as follows: On the 25th of September 1860 the defendant agreed with the plaintiffs to take command of their ship *Wild Hunter*, for the sum of one hundred and fifty dollars a month. She made voyages from New York to Liverpool, Chili, San Francisco, Port Louis, and finally returned to New York on the 23d of August 1864, when the defendant ceased to command her. In September 1862 the defendant collected freight in Liverpool in sterling, and took to his own

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use £261 7s. 2d. In March 1863 he collected freight in San Francisco in gold, and took to his own use \$580.29 in gold. In November 1863 he collected freight in Port Louis in gold, and took to his own use \$1235.40 in gold. And in May 1864 he collected freight in London in sterling, and took to his own use £244 17s. 1d. These were the only items in dispute between the parties, it being agreed that if the defendant was chargeable with the money which he took to his use in Liverpool and London at the rate of \$4.84 to the pound, (which was about the average of the real exchange value of the pound sterling, "on a specie basis,") and with the number of dollars which he took to his use in San Francisco and Port Louis, and no more, he would be entitled to recover as set-off \$173.81, with interest; but if he was chargeable with those sums at the current rates of exchange based on the paper currency of the United States, the plaintiffs would be entitled to recover \$2140.29, with interest.

Judgment was rendered for the defendant for the balance claimed by him; and the plaintiffs appealed to this court.

*C. A. Welch*, for the plaintiffs. The pound sterling should be reckoned at its real value at the time the defendant received it, in the only currency now known here, namely, United States notes. There is no reason for assuming the custom-house value, which was fixed before the war, for a special purpose only. The sovereign, which is equivalent to the pound sterling, is not now a legal tender for any particular amount. There is no propriety in estimating its value in gold dollars. Foreign money should be calculated at its fair market value. It is a commodity, and its market value may be reckoned. *Scott v. Bevan*, 2 B. & Ad. 78. *Lee v. Wilcocks*, 5 S. & R. 48. That value should be based upon the same currency which determines the value of every other article.

*T. K. Lothrop & R. R. Bishop*, for the defendant, were not called upon.

HOAR J. At the time when the defendant made his contract with the plaintiffs, the only legal currency of the United States was gold and silver coin. This has not ceased to be the legal currency of the country at any time since. It is evident from

these considerations that, if he has retained the amount due him by his contract in the gold coin of the country, he has received no more than he was equitably as well as legally entitled to have. The laws authorizing the issue of United States treasury notes, and making them a legal tender in payment of debts, have not made the gold coins of the denomination of one or more dollars a legal tender for any more than the dollars they represent. Because a treasury note, which bears in popular estimation a less value than a gold coin of the same denomination, will pay a debt, the gold coin will not overpay it.

If one man has received to another's use a certain sum of money, in the currency recognized by law as the currency of the country, judgment can be rendered against him only for that sum; and if he has been paid a certain number of dollars in the legal currency of the country, it is only a payment of that number of dollars, although some other kind of currency than that in which he was paid might have been more cheaply obtained. The coined dollar of gold, fixed by law as of the value of a dollar, cannot be treated by any judicial tribunal, in any computation or judgment, as having another or different value. *Wood v. Bullens*, 6 Allen, 516.

The defendant's credits were therefore clearly right, so far as he retained the sums due to him in the coined money of the United States.

The payments retained in English sovereigns, or gold coins reckoned in pounds sterling, are not governed by a rule so simple in its application. But in respect to them the rule is clearly settled. When a debt is due or a payment made in the currency of a foreign country, its amount is to be computed in the currency of the United States according to the real par of exchange; that is, by ascertaining what sum the standard coin of one will produce of equal weight and fineness in the currency of the other. *Commonwealth v. Haupt*, 10 Allen, 38. *Hussey v. Farlow*, 9 Allen, 263. This is an absolute standard, not liable to vary with the causes which produce fluctuations of exchange; and, in the absence of any special contract, appears to be the most practical and just. In *Hussey v. Farlow*, the rule



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was applied to payments made under a charter party in pounds sterling; and we think there is nothing in principle to distinguish that case from the case at bar.

The defendant will have judgment for the amount found due upon his set-off according to the auditor's report.

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CEPHAS C. CHAMBERLAIN vs. NATHANIEL C. A. PREBLE.

If one who has conveyed land with a covenant to warrant and defend the title is vouched in by his grantee to defend a suit brought against him by one claiming an adverse title he in his turn may vouch in his grantor, who conveyed the premises to him with a like covenant, to defend the same suit.

One who has been duly vouched in to defend a title which he has covenanted to warrant and defend will be bound by the result of the suit, establishing the adverse title, although he did not appear therein, and although it was decided upon an agreed statement of facts, in which a fact was misstated, which if correctly stated would have defeated the adverse title, provided such statement of facts was agreed to in good faith and without collusion.

CONTRACT brought to recover damages for the breach of a covenant of warranty contained in a deed of land given by the defendant to James W. Baldwin, who in his turn conveyed the land to the plaintiff with a like covenant.

At the trial in the superior court, before *Ames, J.*, without a jury, the following facts appeared: On the 4th of April 1846, Nathaniel C. Woodman conveyed the premises to Mary W. Comer, wife of George N. Comer, to have and to hold the same to her sole and separate use, free from the interference or control of her husband. On the 18th of November 1846, she conveyed the same by her sole deed to the defendant, who on the 7th of May 1847 conveyed the same to James W. Baldwin by a deed containing covenants that he was lawfully seized in fee simple thereof; that they were free from all incumbrances excepting certain mortgages therein specified; that he had good right to sell and convey the same to said Baldwin, his heirs and assigns forever, subject to said mortgages; and that he and his heirs, executors and administrators would warrant and defend the same to the said Baldwin, his heirs and assigns, forever

against the lawful claims and demands of all persons. On the 21st day of June 1855 Baldwin conveyed the premises to the plaintiff, with like covenants. In November 1848 Mrs. Comer had, for the first time, a living child born; and died in June 1851.

On the 21st of September 1859 George N. Comer commenced a writ of entry against the plaintiff, demanding the premises as tenant by the curtesy. Baldwin, as warrantor of the present plaintiff, assumed the defence of that suit and employed counsel therein, though he did not appear of record; and Baldwin on the 9th of December 1859 caused a formal notice to be served upon the present defendant, informing him that the suit had been commenced, and that the present plaintiff had notified him thereof and claimed to hold him responsible as his grantor, and requesting the present defendant to assume the defence and expense of the suit, and giving notice that he should look to him for all expense and damage to which he might be put by reason of any failure of his title to the premises. The suit of *Comer v. Chamberlain* was submitted to the court on an agreed statement of facts, signed by both parties, and the question arising upon those facts was brought by appeal to the supreme judicial court, where it was decided in favor of Comer, and judgment was finally entered for him in February 1864. This case is reported in 6 Allen, 166. To avoid being ejected, the present plaintiff then paid to Comer \$1300, in consideration of which Comer released the premises to him.

Comer was an alien by birth. On the 10th of February 1845 he filed his primary declaration, for the purpose of being naturalized; and became naturalized on the 5th of July 1847. In the agreed statement of facts upon which the case of *Comer v. Chamberlain* was decided, it was represented that Comer was naturalized on the 10th of February 1845. This error did not arise from collusion or bad faith, but was a mere mistake. It did not appear that the present defendant had any knowledge of the agreed statement of facts, or that the question when Comer was naturalized was brought to his attention at all, or that he participated at all in the defence of Comer's suit.

Upon these facts the judge found for the defendant, on the ground that under these circumstances he was not bound by the judgment, but had a right to show and had succeeded in showing that in fact Comer had no title to the premises. The plaintiff alleged exceptions.

*F. A. Brooks*, for the plaintiff. The defendant was bound by the former judgment. *Rawle on Covenants*, 198, 199. *Hamilton v. Cutts*, 4 Mass. 353. *Duffield v. Scott*, 3 T. R. 377. *Jones v. Williams*, 7 M. & W. 501. *Veazie v. Penobscot Railroad*, 49 Maine, 125. *Kip v. Brigham*, 6 Johns. 158. *Castle v. Noyes*, 4 Kernan, 332. *Coates v. Roberts*, 4 Rawle R. 112. *Paul v. Witman*, 3 Watts & S. 409. The notice to Preble need not appear of record. *Miner v. Clark*, 15 Wend. 427. *Collingwood v. Irwin*, 3 Watts, 310. The date of Comer's naturalization was immaterial. *Foss v. Crisp*, 20 Pick. 121. *St.* 1845, c. 208, § 7. *Scanlan v. Wright*, 13 Pick. 529.

*J. D. Ball*, for the defendant. Comer had no estate as tenant by the curtesy. At that time an alien could not take or hold real estate by descent or in any way by the act of the law. *Foss v. Crisp*, 20 Pick. 121. *Slater v. Nason*, 15 Pick. 349. 1 Cruise Dig. (Greenl. ed.) tit. v. c. 1, § 27. *St.* 1852, c. 29. The judgment in the former action is not binding on this defendant. The plaintiff therein voluntarily and without right admitted away his entire case by agreeing to submit it upon a statement of facts which was false in a vital particular. *Kelly v. Dutch Church*, 2 Hill, 105. *Brown v. Taylor*, 13 Verm. 638. *Pitkin v. Leavitt*, Ib. 385. *Wilson v. M'Elwee*, 1 Strobh. (S. C.) 65. *Sisk v. Woodruff*, 15 Illinois, 18. If the plaintiff had acknowledged Comer's claim without suit, and paid him, clearly he would have done so at his peril. Does he stand any better in this case because he voluntarily submitted the case upon an erroneous statement of facts? The plaintiff knew that Comer was an alien, because that fact was recited in the agreed statement; and knowledge of the exact date was easily accessible. This defendant, however, had no knowledge of that matter. Even if the defendant would be liable if he had been properly vouched in, he was not properly vouched in, as the

notice to him did not come from Chamberlain. *Collingwood v Irwin*, 3 Watts, 310.

COLT, J. The plaintiff in support of his action, and to show a paramount title in Comer, in land conveyed with warranty by the defendant to Baldwin, under whom the plaintiff claims by warranty deed, produced a judgment recovered against him in a writ of entry in favor of Comer. *Comer v. Chamberlain*, 6 Allen, 166. When that suit was brought, the present plaintiff notified his immediate grantor, Baldwin, who assumed the defence, employed counsel therein, and notified the defendant, Preble, of the pendency of the action, and requested him to assume the defence. It does not appear that Preble took any part in the defence. Comer, who was an alien, but had become a naturalized citizen, claimed to hold the demanded premises as tenant by the curtesy. The case was decided upon an agreed statement of facts in which the true date of Comer's naturalization was misstated. Judgment was recovered against the present plaintiff, and the question is upon the conclusiveness of that judgment against the defendant in this case.

In *Boston v. Worthington*, 10 Gray, 498, Metcalf, J. cites with approbation the law as thus laid down by Bell, J., in *Littleton v. Richardson*, 34 N. H. 187: "When a person is responsible over to another, either by operation of law or by express contract, and he is duly notified of the pendency of the suit, and requested to take upon himself the defence of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he was the real and nominal party upon the record. In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not."

The defendant objects that notice of Comer's suit was not properly served upon him, because it was given in the name of Baldwin instead of the plaintiff. The strict formalities required in the writ of *warrantia chartæ* and voucher, as used in the ancient common law warranty, are not required, to render the

judgment conclusive in an action upon the modern covenant of warranty. The question in these cases usually is, whether the defendant has had reasonable notice of the suit, and an opportunity to defend it. If he has, he is bound by the proceedings. It is not necessary that the notice should appear of record; and no particular form of words is necessary. In some cases a verbal notice has been held sufficient; in others the presence of the defendant and his participation in the defence have been enough to render the judgment conclusive.

In this case Baldwin, having assumed the defence and employed counsel, was acting with the consent and at the request of the present plaintiff, Chamberlain, and it is perhaps a sufficient answer to the defendant's objection that, while that relation existed, Baldwin is to be regarded as having been the attorney and agent of Chamberlain, to do all that properly pertained to the defence of that suit. By assuming the defence, Baldwin became privy if not a party to that judgment, and pending the suit a notice from him to the defendant, it seems to us, was quite as proper and effectual as if given in the name of Chamberlain. Under such a notice, with an opportunity to appear and defend, he cannot be deemed a stranger to the proceedings. *Miner v. Clark*, 15 Wend. 427. Rawle on Covenants, 200.

But the defendant further insists that the judgment is not conclusive upon him because founded on an agreed statement of facts which was untrue, in that it stated the date of Comer's naturalization to be February 10th 1845, instead of July 5th 1847; and that this was a material inaccuracy, because, the latter being the true date of naturalization, and the land having been previously conveyed by his wife, Comer could not be tenant by the curtesy, and could not have recovered judgment, and so the plaintiff virtually admitted a fact which did not exist, and was material in the case.

It is plain that if the plaintiff had without suit acknowledged he title of Comer and paid the amount required to extinguish it, he would have done so at his peril, and could not now prevail against the defendant without proving the paramount title of Comer. To what extent and in what manner must a party, who

is threatened with eviction by the holder of a paramount title, and who has notified his warrantor to come in and defend, resist the claim which is sought to be enforced by legal proceedings, in order that the judgment which may be rendered against him may be conclusive in a suit upon his covenant of warranty?

A faithful performance of the covenant to warrant and defend requires the covenantor, on notice, to appear and take upon himself the defence of the estate, when assailed by a paramount title. After suit brought and notice to him, the covenantor stands in a different relation to the party who has a right to look to him for indemnity. If he does not assume the defence, it is at least his duty to communicate all information in his power as to the validity of the plaintiff's title. If he fails to do so, if he stands by and permits a recovery for want of evidence of which he has knowledge, he cannot be permitted to show that the result would have been otherwise if the evidence had been produced, and so avoid the effect of the recovery in a suit against him. If he pays no attention to the notice, and turns his back upon the suit, he cannot when called upon to respond be permitted to prove that the defendant in the original suit would have prevailed if the defence had been conducted with a fuller knowledge of material facts. The judgment of courts must be based on the facts as they are presented. No doubt if the truth could always be fully and accurately known, many decisions would appear erroneous, but it is for the public interest that there should be an end of litigation; and parties and privies who have once had day in court cannot, by mere proof or offer of proof that the judgment was founded on error in fact, renew the controversy. Nor can it make any difference that the facts or some of them, in a proper case, were agreed by the parties, instead of being passed upon by the jury. Few trials before a jury are had without the agreement of parties or counsel to many matters thought not to be in controversy. The execution of written instruments, the testimony of absent witnesses, and the date of the happening of a particular event, are of this class. A mistake in the admission of any one such fact, if material, would be quite as fatal in its effect upon the conclusiveness

of the judgment as an error in an agreed statement of facts. Indeed, if the effect of the judgment is to be avoided in such cases, it is difficult to say that the existence of material evidence which the defendant failed to produce would not have the same effect. To come to this, it is evident, would be to open to litigation every judgment for eviction upon which the covenantee seeks indemnity from his grantor.

The judgment by which the plaintiff has been evicted is not to be impeached in an action against a grantor upon his covenants, who was duly notified, merely by proof of mistake in the conduct of the defence of the original suit, if there is no want of fidelity, and the judgment is free from fraud or collusion. In *Jackson v. Marsh*, 5 Wend. 44, it seems to be held that after notice to the covenantor and a request to defend, the covenantee is not bound to defend, and a judgment on default even is conclusive. And when the covenantee acts in good faith under the advice of counsel after an action is commenced and notice given, with failure of the defendant to respond, it is difficult to see why he should be obliged to go through with the form of a trial which he is advised must result in a recovery against him.

The case of *Kelly v. Dutch Church*, 2 Hill, 114, cited by the defendant, was a case where the plaintiff failed to establish that he was evicted by a title paramount to that of the defendants, at the time of the defendants' conveyance. He not only failed to do this, but he proved that the recovery was had against him upon a right or title subordinate to that of the defendants, and which the plaintiff was estopped to deny by the acts and declarations of those under whom he claimed title. The recovery in Comer's suit was on the sole ground of title paramount to that conveyed by the present defendant. It was a case manifestly proper to be presented on an agreed statement of facts. Both parties regarded the case as presenting mainly a question of law upon facts the nature of which hardly admitted of serious controversy before the jury. The error in regard to the date of Comer's naturalization was innocently made; it was perhaps not thought material whether it occurred before or after the conveyance by his wife. It is now argued that, though it occurred

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after the conveyance, yet he was equally entitled to his tenancy by the curtesy. He was naturalized before his wife's death, and before the birth of issue. It was indeed held by the court in *Comer v. Chamberlain* to be sufficient to enable the demandant to recover "if the essential requisites of a tenancy by the curtesy existed during the lifetime of the wife;" but the chief justice was then speaking evidently of the elements necessary to entitle the plaintiff to a tenancy by the curtesy at common law, and without reference to his alienage at the time of his wife's conveyance. And though it is said by Lord Coke that naturalization cancels all defects and is allowed to have a retrospective energy which simple denization has not, and if a man take an alien to wife and afterwards sell his land and his wife be naturalized she shall be endowed of the lands held before eviction; Co. Litt. 33 a, 129 a; yet it has been held in this country that the peculiar phraseology of our naturalization laws gives them no retroactive force to affect the rights of third persons previously acquired, in analogy to the simple denization of England. *Priest v. Cummings*, 20 Wend. 338.

But without discussing this point further, and assuming but not deciding that the mistake in the date of naturalization was a mistake material to the recovery by Comer in that suit, we are of opinion that the judgment in that case is conclusive upon the defendant in this, notwithstanding the mistake.

*Exceptions sustained.*

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SARAH C. HAVEN vs. WINNISIMMET COMPANY.

If a matter in dispute is submitted to two persons, with authority in case of disagreement to choose a third person, the award of whom or a majority of whom, in case a third person shall be chosen, shall be final, and the two arbitrators, being unable to agree as to the amount of damages, appoint a third person "as umpire to act with us in the hearing and final decision thereof in the manner contemplated in said agreement," and the person so chosen, after a new hearing before all three of them, makes to the parties a written statement of his decision which shows that he arrived at it without consultation with the other arbitrators, and that he did not consider it to be his duty to fix independently the amount



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of damages to be awarded, but only to determine which of the others had fixed the sum nearest in his judgment to justice and equity, and he accordingly unites with the arbitrator who fixed the highest sum, and those two make an award of damages, by a separate paper, which does not show that the other arbitrator acted at all in the case, such award is void; although such third person declares his own opinion that the sum awarded is too small.

CONTRACT brought in this court upon an award. The declaration alleged that the plaintiff was executrix of the will of Nathaniel Haven, deceased; that said Nathaniel, through Charles Dupee his guardian, by his agreement in writing with the defendants, a copy whereof was annexed, referred the matters therein mentioned to arbitrators; and, in case of a disagreement, the said arbitrators were to choose a third person, the award of whom, or a greater part of whom, was to be final in the matter; that thereupon, after due notice, the parties appeared before the first named arbitrators, and after due hearing they, in a writing by them signed, a copy whereof was annexed, stated that they were unable to agree, and thereupon appointed Newell A. Thompson as umpire and arbitrator in the matter; of all which all parties had due notice; and thereupon said Thompson, as arbitrator and umpire as aforesaid, and said arbitrators, after due notice, heard all the parties; and said Thompson, as said umpire and arbitrator as aforesaid, then and there gave his decision, determination and award, in a writing by him signed, a copy of which was annexed; of all which all parties had due notice; and the majority of said arbitrators, including said Thompson as one of said arbitrators, after said due notice and said due hearing of all parties, by all of said arbitrators, gave their award and determination in writing, by them signed, a copy of which was annexed; all which was made known by said arbitrators to all parties; and thereafter said Nathaniel Haven died; and the plaintiff was thereafter duly appointed executrix as aforesaid, and gave due notice thereof, and made demand upon the defendants for the amount of said award and the interest thereon; but the defendants refused to pay the same.

The material portions of the submission were as follows:

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Company, a corporation, . . . . and Charles Dupee, . . . . guardian of Nathaniel Haven, . . . . have agreed to submit the claim of said Haven against said company for personal injuries suffered on board the ferry-boat of said company on the eighteenth day of September last, and all other demands between said ward and said company, to the determination of Henry Farwell . . . . and Joseph Breck, . . . . they in case of disagreement to choose a third person, the award of whom or a majority of whom, in case a third person shall be chosen, shall be final; and if either of the parties neglects to appear before the arbitrators after due notice given them of the time and place appointed for hearing the parties, the arbitrators may proceed in his absence."

The written statement of the above arbitrators of their inability to agree was as follows :

"The undersigned referees, appointed in the case of Charles Dupee, guardian of Nathaniel Haven, against the Winnisimmet Company, pursuant to the agreement hereto annexed, being ourselves unable to agree upon the facts and amount of damages to be awarded, do hereby appoint Newell A. Thompson, of Boston, as umpire in said case, to act with us in the hearing and final decision thereof, in the manner contemplated in the said agreement."

The written decision of Thompson, referred to in the declaration, was very voluminous, but the following statement of it will show all that is now material :

It commenced by reciting the proceedings in the case to the time of his appointment, and then proceeded as follows : "The undersigned, being the third person or umpire chosen as above, was unwilling to act in a case of so much importance without personally hearing the several parties and their witnesses. Accordingly a new hearing was ordered, and on Monday, September 22, 1862, the parties met for that purpose at the office of the Boston Water Power Company in Boston, both referees and the umpire being present." The grounds relied upon by the plaintiff and the defendants, respectively, together with their witnesses, were then mentioned, after which the statement continued

"Now the undersigned, the umpire appointed as aforesaid, having fully and carefully considered the grounds upon which the plaintiff's claim for damages is founded, the defendants' points of defence, and all the testimony offered by both parties, begs leave to submit the following as his decision and award in the case, and the reasons upon which his decision is based." The points which seemed to be involved were then given; and in reference to all of them, as well as to the testimony in the case, which was recited at great length, his opinion was expressed, it being frequently spoken of as "the opinion of the undersigned;" and throughout the statement his own opinion was referred to, without any mention of any consultation with the other arbitrators, or of any opinion which either of them had arrived at, upon the second hearing of the case. The statement then proceeded to say: "Under these circumstances, therefore, the undersigned feels compelled to declare that, in his opinion, the defect or imperfect working of the bell-apparatus; the failure of those whose duty it was to look after and guard against such defects or imperfections, and to make the proper examinations for that purpose; the placing of an incompetent steersman at the wheel and leaving him alone there to do the duty which none but pilots of experience should be permitted to undertake; and the unnecessary absence of Capt. Reed from the wheel-house at the time of the accident, he having assumed the position he did as the acting and responsible pilot in the absence of the regular pilot; clearly show such a degree of inexcusable carelessness and negligence on the part of the defendant company, its agents or servants, as to render the said company liable for all damages arising from accident caused by such carelessness or negligence." Then, after speaking of the rule of damages, and the plaintiff's condition, the statement continued thus: "The undersigned, however, does not consider that, by the terms of the agreement by which the parties submitted this case to him as umpire, he has himself any authority to fix the amount of damages to be awarded, but that his duty is only, after a full hearing and due consideration of the case, to determine which of the two referees have fixed upon the sum nearest, in his judgment, to justice

and equity. The referee selected by the defendants fixes the amount of damages at the sum of six hundred dollars, thereby recognizing and admitting two principal features in the case, that the plaintiff's ward did sustain injuries by reason of the accident, and that the defendants are liable for such injuries to a certain extent. If they are liable for any part of the injury they caused the plaintiff's ward to suffer, by reason of their own carelessness or negligence, or that of their servants or agents, they must be liable for the whole. Is, then, six hundred dollars, under all the circumstances shown in this case, a sufficient compensation for injuries, past and prospective, sustained by Mr. Haven? Is it a sufficient sum to compensate him for actual expenses, loss of time, loss of capacity to earn money, or as a reasonable solace or satisfaction for loss of bodily and mental powers, and pain of body and mind, which were the immediate and necessary consequences of the injuries sustained? Is it reasonably commensurate with the injuries, so far as can be discovered or known? Clearly not. The undersigned is therefore compelled to unite with the referee selected by the plaintiff, who has fixed the amount of damages to be awarded at the sum of three thousand dollars; and in doing this he feels bound to say that if the sum had been fixed still higher by the plaintiff's referee, even to the full amount claimed by the plaintiff, the umpire could not have hesitated in that case to decide in favor of the plaintiff, fully believing as he does that such increased amount could not and would not be considered, by any disinterested persons who should carefully examine into the case, as either vindictive or speculative damages, or a greater compensation, all things considered, than is reasonably commensurate with the injuries sustained by Mr. Haven, by reason of the inexcusable carelessness or negligence of the agents and servants of the defendants. For these reasons, and with these expressions of his opinion in the case, the undersigned, as umpire, agrees to the subjoined award."

The material portions of the award referred to, which was signed only by Breck as referee, and Thompson as umpire, were as follows :

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"We, Joseph Breck, one of the referees chosen by the parties above named, under and by virtue of their written agreement hereunto annexed, and Newell A. Thompson, the umpire selected by the two referees in the case, pursuant to the provisions of said agreement, we two constituting a majority of those to whom the said case has been submitted for final adjustment, having heard all the evidence in the case, and fully considered the facts and circumstances connected therewith, as well as the rights of the respective parties, do hereby agree upon the following as our award in the premises, viz.: We do award that the said Winnisimmet Company shall pay to the said Charles Duppe, guardian, for the use of the said Nathaniel Haven, the sum of three thousand dollars, with interest thereon from and after the date of the commencement of this suit."

The award also provided that the defendants should pay all the costs.

The answer, amongst other things, alleged that the award was void, because Thompson did not exercise his own judgment in determining the amount of it, but only determined which of the sums fixed upon by each of the other arbitrators was nearer in his judgment to justice and equity.

The case was reserved by the chief justice upon these pleadings and papers for the determination of the whole court.

*G. A. Somerby*, for the plaintiff. The objection of the defendants assumes the agreement to submit the matter to arbitration, the selection of two arbitrators, a hearing by them and a disagreement as to the amount of the award, and the selection by them of Thompson as the umpire or third person named in the agreement to refer, to act with them. The record does not support the objection that is made. The award signed by Breck and Thompson in terms set forth that they agreed upon the amount therein named as their award. The particular reasons of Thompson, as set forth in the other paper signed by him, do not vary the award. Perhaps, after a disagreement of Breck and Farwell as arbitrators, it was well enough for him to state the reasons of his judgment; but the award is *not thereby* varied. *White v. Sharp*, 12 M. & W. 712.

Thompson was not a legal umpire. An umpire is one who takes upon himself alone the decision, after arbitrators have disagreed. Calling him an umpire does not make him one. The paper appointing him shows that he was to act in the manner contemplated in the agreement of submission; that is, clearly, as an arbitrator. Thompson's paper shows that he called himself "the third person or umpire chosen as above," and that "both referees and the umpire" were present at the second hearing. Taking this paper all together, does it not show that they acted together? Now this paper of Thompson's must be treated either as a part of the award, or as not a part of it. It is conceded, as the defendants contend, that it is to be considered as a part of the award; but if so, it shows that all the arbitrators acted. They were all present, and there was a rehearing before them.

The only question was as to the amount of damages. All of the arbitrators agreed that some damages should be given. Each arbitrator, if left to his own judgment, had a different opinion as to the proper amount. This is always so. No two minds agree. Somebody must always give up. In this case, Thompson would have given more; but he says he will agree with Breck upon a smaller sum than he should have fixed himself. How are the defendants hurt by this? It does not appear that the arbitrators did not all consult together. It cannot be inferred that they did not from the statement that Thompson agreed with Breck.

*P. W. Chandler & J. B. Thayer*, for the defendants. The arbitrators acted throughout on the opinion that Thompson was an umpire. But the two arbitrators had no authority to appoint an umpire. *Lyon v. Blossom*, 4 Duer R. 318. *Little v. Newton*, 2 Man. & Gr. 351. Arbitrators must attend all the hearings and determine the matter after joint consultation. *Maynard v. Frederick*, 7 Cush. 247. *Short v. Pratt*, 6 Mass. 496. *In re Pering*, 3 Ad. & El. 245. But an umpire must decide on his own judgment alone. *Lyon v. Blossom*, *ubi supra*. *Soulsby v. Hodgson*, 3 Burr. 1474. *Tunno v. Bird*, 5 B. & Ad. 488. *Bates v. Conke*, 9 B. & C. 407. Thompson's separate paper must be

taken as a part of the award. *Kent v. Elstob*, 3 East, 18, 20. This paper shows conclusively that Thompson acted as umpire while the award shows that only Thompson and Breck consulted together. Nobody but Breck was satisfied with the sum awarded. See *Whitmore v. Smith*, 5 Hurlst. & Norm. 824, 830. If Thompson's paper is excluded, there is nothing to show that the other arbitrator acted. It is indispensable that this should appear. *Short v. Pratt*, 6 Mass. 496. *Bigelow v. Newell*, 10 Pick. 354. *Deerfield v. Arms*, 20 Pick. 484. *Sperry v. Ricker*, 4 Allen, 17. It is trifling to say that all were acting because all were in the same room.

BIGELOW, C. J. It is impossible to maintain this award. It cannot be supported either as an award of arbitrators or as the award of an umpire.

In the first place, the parties did not agree to submit the subject matter of difference between them to the determination of an umpire, in case of a failure to agree by the arbitrators named in the submission. An umpire is a person whom two arbitrators, appointed and duly authorized by parties, select to decide the matter in controversy, concerning which the arbitrators are unable to agree. His province is to determine the issue submitted to the arbitrators on which they have failed to agree, and to make an award thereon which is his sole award. Neither of the original arbitrators is required to join in the award in order to make it valid and binding on the parties. In the absence of any agreement or assent by the parties to the controversy, dispensing with a full hearing by the umpire, it is his duty to hear the whole case, and to make a distinct and independent award thereon, as the result of his judgment. He stands in fact in the same situation as a sole arbitrator, and he is bound to hear and determine the case in like manner as if it had been originally submitted to his determination. *Watson on Arbit.* (3d ed.) 100. *McKinstry v. Solomons*, 2 Johns. 57. *S. C.* 13 Johns. 27. *Bates v. Cooke*, 9 B. & C. 407. *Salkeld v. Slater*, 12 Ad. & El. 767. *Passmore v. Pettit*, 4 Dall. 271.

By the terms of the submission in the present case, it is clear that the parties did not intend that the arbitrators whom they

appointed should select an umpire. The agreement is explicit that in case of disagreement by the arbitrators they should appoint a third person, and that the award of the majority of the three should be final. This excludes the power of appointing an umpire, whose sole award was to be valid and binding, and necessarily implies that the third person to be selected in case of disagreement was to be a third arbitrator, whose power is expressly limited to making an award in conjunction with the other two, or one of them.

There can be no doubt, therefore, that the arbitrators mistook their authority in appointing a third person to act as umpire. No such power was delegated to them by the submission. But this error might not have been fatal to the award, if it had appeared that the third person whom the arbitrators selected as umpire had in fact acted with them in hearing and deciding the case, exercising a free and independent judgment, and uniting with one of them in the award. It appears, however, that he entirely misunderstood the authority which was vested in him by the appointment under which he acted, and that he did not take on himself the performance of the functions either of an arbitrator or an umpire. In either capacity, it was his clear duty to hear the evidence adduced by both parties, and their respective allegations and arguments, and thereupon, acting fairly and impartially, to form his own independent judgment on the case before him. This he did not do. On one of the main issues involved in the controversy between the parties which formed the subject matter of the submission, it is shown that he studiously refrained from acting on his own opinion of the merits of the case. His own statement puts this fact beyond dispute. He says that he did not consider "that by the terms of the agreement by which the parties submitted this case to him as umpire, he has himself any authority to fix the amount of damage to be awarded, but that his duty is only, after a full hearing and due consideration of the case, to determine which of the two referees have fixed upon the sum nearest, in his judgment, to justice and equity." And then, after assigning reasons for his conclusion, he adds: "The undersigned is



therefore compelled to unite with the referee selected by the plaintiff, who has fixed the amount of damages to be awarded at the sum of three thousand dollars." From this language it is apparent that he mistook the capacity in which he was alone authorized to act under the submission, and also that he entirely misconceived the duty which devolved on him, acting either as an umpire or as an arbitrator. It was in the latter capacity only that he had authority to act. But he did not exercise the authority. Not only is it clear that the amount of damages awarded is not the sum which he would have given, if he had supposed he was authorized to allow a different amount, but it is also manifest that he did not enter into consultation with the other arbitrators concerning the facts of the case, nor permit himself to exercise his own independent judgment, either in consulting with them or in making up his award. Besides; the inference is unavoidable, from his statement, that he did not suppose that he was authorized to enter into a general examination of all the facts involved in the issue, and to form a judgment on the question of the liability of the defendants to pay any damages to the plaintiff's testator, but that he felt constrained by the terms of his appointment to confine himself to the amount of damages which the plaintiff was entitled to recover.

The insuperable difficulty, therefore, in the way of maintaining an action on this award, is not only that it appears that the third person selected by the parties exceeded his authority under the submission by acting as umpire, but that he wholly failed properly to discharge the functions of arbitrator. The award cannot be regarded as being valid on the ground that he acted in the latter capacity, because he did not consult with the other two arbitrators on the whole case, nor did he pass on all the questions at issue between the parties, or exercise his own independent judgment on the matter concerning which he undertook to make an award. It is impossible for any one now to say what his opinion or judgment would have been if he had acted as arbitrator, and had duly considered the whole case in consultation with the other arbitrators.

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Lawrence v. Holyoke Insurance Company.

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It is true that he says he should have been willing to allow a greater sum in damages than is given by the award, if the arbitrator appointed by the plaintiff had fixed on a higher sum. But this affords no argument in support of the award, because it cannot now be known that such would have been his opinion and judgment if he had formed it fairly and impartially, after due deliberation and consultation with the other two arbitrators, with both of whom he was authorized and bound to act in arriving at a conclusion on the case submitted.

*Judgment for the defendants.*

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DANIEL S. LAWRENCE vs. HOLYOKE INSURANCE COMPANY.

If it is provided in by-laws which are a part of a contract of insurance that "when any property shall be alienated, by sale or otherwise, the policy thereupon shall be void," and the insured, after mortgaging the property and assigning the policy with the consent of the insurers, conveys the equity of redemption without such consent, the policy thereupon becomes void.

CONTRACT upon a policy of insurance issued by the defendants to Ranney & Morse, by whom it was assigned, with the consent of the defendants, to Mrs. Laura M. Pelton, on the 1st of April 1858, who thereupon gave to the defendants her premium note for the same. It was provided in the by-laws of the defendants, which were made part of the contract between the parties, that "when any property shall be alienated, by sale or otherwise, the policy thereupon shall be void."

At the trial in the superior court, before Ames, J., it appeared that Mrs. Pelton, after giving to the defendants her premium note as aforesaid, mortgaged the property and assigned the policy to Ranney & Morse, who assigned the mortgage and policy to James L. Mills, who assigned them to the plaintiff—all with the defendants' written consent. It also appeared that in December 1859 Mrs. Pelton and her husband conveyed the premises to Sally Hill, who in February 1861 conveyed them to Mary M. Ladd; and no notice of these two conveyances was ever given to the defendants.

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Upon this evidence, the judge directed a verdict for the defendants, which was accordingly rendered; and the plaintiff alleged exceptions.

G. A. Somerby, for the plaintiff, cited *Foster v. Equitable Ins. Co.* 2 Gray, 216; *Fogg v. Middlesex Ins. Co.* 10 Cush. 345.

S. B. Ives, Jr. & C. H. Hill, for the defendants, cited *Edes v. Hamilton Ins. Co.* 3 Allen, 362, and cases cited; *Loring v. Manuf. Ins. Co.* 8 Gray, 28; *Bowditch Ins. Co. v. Winslow*, 3 Gray, 415; *Sanford v. Mechanics' Ins. Co.* 12 Cush. 541.

CHAPMAN, J. The authorities cited are decisive of the question presented in this case. When Mrs. Pelton gave her premium note, after the assignment of the policy to her, she became the "insured." She afterwards mortgaged the property and assigned the policy to the mortgagee, and he assigned both the mortgage and the policy to the plaintiff, and the assent of the company was given to these assignments. But neither Mills nor the plaintiff gave to the company a premium note, and therefore did not become the "insured" within the meaning of the policy. They were merely assignees of the policy, and entitled to the money to be paid in case of loss. Mrs. Pelton continued to hold the relation of the "insured" to the defendants, she being the owner of the equity of redemption, and therefore the plaintiff was affected by her subsequent acts. She conveyed the property to Hill, and he conveyed it to Ladd. These were alienations of the property, and by the terms of the policy it was thereby made void. *Exceptions overruled.*

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#### EDWARD G. PARKER vs. SAMUEL P. BENNETT & another.

If a deed of a lot of land situated between R. and S. Streets in a city describes the granted premises by metes and bounds, and refers to a recorded plan for a full view and description thereof, and adds, "Said lot is approached from S. Street by a passage, laid down on said plan, together with all the buildings standing on the premises, and all rights of way, passage and drainage belonging to the above estate in said passage," and the passage from S. Street is laid down on the plan and is sufficient to afford access to the lot,

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the deed will not include, as appurtenant to the granted premises, a right to use another passage which is not laid down on the plan, leading to R. Street, and which is owned by the grantor; nor can such right be established by proof that the grantor has laid a drain from the granted premises through such passage, or that he purchased the passage with the purpose of using it as a way to the granted premises, and for a time permitted the tenants of the granted premises so to use it.

**BILL IN EQUITY** praying for an injunction to restrain the defendants from erecting a fence across a passage.

The case was referred to a master, whose report was agreed to be taken as a statement of facts, upon which the decision of the chief justice, before whom the case was heard, should be final. The chief justice decided that the plaintiff was not entitled to the use of the passage in question, either by prescription or dedication; and the question whether the right to the use of the passage passed as appurtenant to the estate owned by the plaintiff, by the deeds thereof, was reserved for the determination of the whole court. The master found that the passage leading to Southac Street was ten feet wide, quite steep, and that it was difficult for the tenants of the Primus Hall estate (so called) to carry wood and coal over it. The other facts are sufficiently stated in the opinion.

*F. O. Prince*, for the plaintiff.

*J. Codman*, for the defendants.

**HOAR, J.** From the facts presented by the master's report, and the decision by the chief justice of the questions raised upon it, agreed by the parties to be final and conclusive, but a single question remains for the consideration of the court. That question in substance is; whether R. W. Holman, by his deed January 19, 1847, to Arthur Pickering, under whom the plaintiff claims, conveyed the right of way in controversy over the land which now belongs to the defendants.

The plaintiff's estate is known as lot No. 6 of the Primus Hall estate, situated between Southac and Revere Streets in Boston, and accessible by a passage way, not convenient for some purposes, but, so far as the evidence shows, sufficient, leading from Southac Street and appurtenant to the estate. The deed from Holman to Pickering conveyed lot No. 6 by metes and bounds, referring to a recorded plan for a full view

and description of the premises, and contains this clause: "Said lot 6 is situated in the rear of Southac Street, . . . and is approached from said Southac St. by a passage way about ten feet wide also laid down on said plan, together with all the buildings standing on the premises, and all rights of way, passage and drainage belonging to the above estate in said passage way." It also refers to a deed from Jonas W. Clark to Holman of July 1, 1846, for a further description, reciting that the premises conveyed are the same described in that deed. On referring to the deed from Clark to Holman, the boundaries of the land appear to be the same, and the only difference between the two deeds is, that Clark's deed conveys all rights of way, passage and drainage in the passage way from Southac Street "or otherwise." But as at the date of that deed there were no other rights of way appurtenant to the estate, we do not see that the words "or otherwise" add anything to the effect of the conveyance.

The land of the defendants, over which the plaintiff claims a right of way, is not laid down on the recorded plan as a passage way. It was a strip of land nine feet wide, and extending one hundred feet from Revere Street to the land of the plaintiff, laid out by one Wingate, who owned it in fee, as a passage way for the benefit of lands belonging to him on each side of it. On the 8th of October 1846 Wingate granted one of the lots adjoining it to Levi McLane, and bounded it on the passage way, "forever to be kept open," with a recital that "said passage way is to be used in common by all abutters thereon, and to be kept open and unobstructed, and in good condition, at their joint expense." On the 15th of the same October, Wingate granted to Herman K. Fowle a right in the passage way as appurtenant to five houses on the easterly side thereof "for all necessary purposes connected with the five houses," and also the right of making drains, &c.

On the same 15th of October, Wingate conveyed to Holman, who had purchased lot No. 6 in July preceding, the fee of the passage way, by a deed which described it as "a certain parcel of land now used as a passage way," giving its boundaries, and adding, "the same being a passage way laid out by

myself through land lying on the north side of May Street." subject to the rights in the same granted to McLane and Towle. May Street is now Revere Street.

The evidence reported shows that the passage way had been for a long time freely used by the owners and occupants of lot No. 6, before Holman purchased ; but without right, and by permission only. From the time when Holman bought it, he allowed his tenants to use it as a passage way to lot No. 6, and laid down water pipes through it from May Street to the houses thereon ; and at the time when Holman conveyed to Pickering, and for ten years afterward, it was constantly used by the occupants of lot No. 6, without objection.

The parol evidence of Holman's intention when he purchased of Wingate, upon which it is found as a fact that he purchased the passage way with the purpose of using the same as a way to and from lot No. 6 owned by him, is only competent as explaining the acts done by him while he owned both estates, and before he conveyed to Pickering. It has a legal tendency to prove that the use of the passage way by his tenants was by intention and design, and not from mere indifference or inadvertence on his part. It is clearly not competent to show by parol that it was his intention to include a right in the passage way in his grant to Pickering. So far as the parol evidence tended to show the existing condition of the property at the time of the grant to Pickering, and thus aided in the construction of that grant by showing to what subject matter it applied, it was competent and material ; but only to that extent.

We have then to decide whether, under the law as settled in this commonwealth, any right in the passage way passed from Holman to Pickering as appurtenant to the grant of lot No. 6. If it did, it was wholly by implication, because there is nothing expressed in the deed which would include it.

The whole doctrine in relation to grants by implication of easements as appurtenant to a conveyance of land has recently been examined in *Carbrey v. Willis*, 7 Allen, 364 ; and we cannot see that, consistently with the rule declared in that case, the claim of the plaintiff in this suit can be supported.

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To raise the implication, the easement must be *de facto* annexed to the estate conveyed at the time of the grant, and must be necessary to its enjoyment in the condition in which it then is. A distinction was suggested in *Johnson v Jordan*, 2 Met 234, between the reservation of an easement by the grantor in the estate which he grants, for the benefit of land which he retains; and the grant of an easement in other land which he owns, for the benefit of that which he conveys; and it was intimated that there might be an implied grant of an easement under circumstances where there would be no implication that an easement was reserved. The case before us presents the case of an easement claimed under a grant, which is to be construed most strongly against the grantor. The grant will include whatever the grantor had power to convey, which is reasonably necessary to the enjoyment of the principal subject of the grant. But the difficulty is, that the evidence, or the finding of facts upon it, does not show that the use of the passage way was necessary to the enjoyment of lot No. 6. It was highly convenient, and Holman, while he owned both, used it, as he had a right to do, in connection with his estate. He bought it for the purpose of so using it. But the question still remains, did he intend to sell the easement with the estate? He had a right to retain it if he chose, and his deed, in terms, shows no intention to the contrary. He testifies that he intended, when he bought the passage way, "to build up the Primus Hall estate, and make a different thing of it." But it does not appear that he built upon the estate, or did anything to make the passage way more necessary to the estate than it was before he had any right in it. The purchase of the passage way gave him a piece of land, forever to be kept open as a passage way for the use of other abutters, and therefore of little value or use except as a way, and he gave a nominal consideration for it. He put down water-pipes through it, and to that extent made the use appurtenant to the Primus Hall estate. It was held as early as a case in Moore, 682, *Brown v. Nichols*, that a conduit to conduct water to a house will pass as appurtenant to a grant of the house. But making an easement in the passage way appurtenant cannot

carry with it another; nor can calling the land which he purchased by metes and bounds "land used as a passage way," or describing it as "being a passage way," in the deed by which it was conveyed to him, make it any less a separate estate to be used and enjoyed, retained or sold, as any other piece of land could be, at its owner's pleasure. It was called a passage way in Wingate's deed to Holman obviously because rights of way in it had been already granted to McLane and Towle.

He then sells the principal estate by metes and bounds, without any reference to a right in the passage way in controversy, but with an express grant of an easement in another passage way. His deed recites that the premises conveyed are the same estate conveyed to him by Clark by the deed of July 1846; and by that deed no right in the passage way in controversy was included. He refers, "for a full view and description of the premises hereby conveyed," to the recorded plan; and upon that plan no passage way like that which the plaintiff claims is shown. This last consideration is one entitled to great weight. When a plan is referred to, as containing a description of an estate, what appears upon the plan is to be as much regarded, in ascertaining the true description of the estate, and the intent of the parties in making it, as if it was recited in the deed. *Morgan v. Moore*, 3 Gray, 319. The passage way which the deed describes is shown upon the plan, but the land where a passage way is now claimed is merely marked as land belonging to a third person. As far as the plan can show a negative, it excludes the existence of such a passage way as appurtenant to the estate conveyed. And it is not a way necessary to the enjoyment of the estate conveyed in its condition at the time of the conveyance.

The question reserved must therefore be answered in favor of the defendants.



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Reed v. Maynard & another.

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**SAMUEL G. REED vs. LAMBERT MAYNARD & another.**

A notice in the following form, though without date, served by bail upon the plaintiff's attorney on the day of surrendering their principal, was held sufficient: "You will please take notice that we the undersigned, sureties for B. in the case of A. v. B. now pending in the superior court within and for the county of Suffolk, have this day surrendered him to the keeper of the jail at said jail in said county of Suffolk, at 11½ o'clock, A. M."

SCIRE FACIAS against bail. At the hearing in the superior court, before *Morton*, J., it appeared that the defendants, being bail of Samuel Gamage in a suit brought against him by the present plaintiff, surrendered him to the sheriff at the jail in Suffolk county, where the arrest was made and the suit was pending, on the 9th of April 1863, and thereafter on the same day their attorney delivered to one of the attorneys of the plaintiff a notice of which the following is a copy:

"Commonwealth of Massachusetts, Suffolk, ss. Jewell & Field, Esqrs., Dear Sirs: You will please take notice that we the undersigned, sureties for Gamage in the case of Reed vs. Gamage, now pending in the superior court within and for the county of Suffolk, have this day surrendered him to the keeper of the jail at said jail in said county of Suffolk, at 11½ o'clock, A. M. L. Maynard. G. L. Gamage, per John D. Howe, his attorney."

On the same day Gamage was discharged upon taking the poor debtors' oath, and certain questions arose as to the regularity of those proceedings which are now immaterial.

The judge directed a verdict for the defendants, which was accordingly rendered; and the plaintiff alleged exceptions.

*H. Jewell*, for the plaintiff.

*J. D. Howe*, for the defendants.

COLT, J. The provisions under which bail may exonerate themselves from further responsibility by surrendering their principal are contained in Gen. Sts. c. 125, §§ 15-19. All these provisions were complied with by the defendants, unless the notice in writing to the plaintiff or his attorney "of the time when and the place where the prisoner was so committed" was invalid.

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Toll v. Merriam.

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The plaintiff contends that it does not give notice of the time when the surrender of the debtor was made. The notice is without date, but it was made and served on the plaintiff's attorney on the day of the surrender, and therefore could not mislead him. The notice, we think, also gave a sufficient description of the suit in which the bail was taken, and of the relation of the defendants to it. The name of the suit, the court in which it was pending, and the fact that the defendants are sureties for Gamage, the defendant therein, are all stated in the notice, and are quite sufficient to enable the plaintiff to identify the case.

In the view we take of this notice, it is not necessary to consider whether the provisions of § 18 requiring it are conditions to the validity of the surrender, or only directory. The case of *Jones v. Varney*, 8 Cush. 137, goes far to show that they are only directory.

The bail, having exonerated themselves by a surrender of the principal in accordance with the provisions of the statute, could not be affected by anything that afterwards occurred upon the application of the principal for the benefit of the oath; and the judge rightly rejected evidence of those proceedings.

*Exceptions overruled.*

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CHARLES F. TOLL vs. CHARLES MERRIAM.

If the examination of a debtor on his application to take the poor debtors' oath is adjourned to another day, and he is ordered to produce certain books of account at the adjourned hearing, and he duly appears at the adjourned hearing within the hour but without the books, and then goes away to get the books without any new request or express consent of the creditor or magistrate, and does not return till shortly after the expiration of the hour, and his absence is not unreasonably or unnecessarily long for that purpose, the magistrate may retain jurisdiction of the case and pursue the examination and administer to him the oath, although the creditor objects thereto.

CONTRACT against the surety in a recognizance, the condition of which provided that the judgment debtor, who had been arrested on an execution in favor of the plaintiff, should within thirty days deliver himself up for examination, giving notice of

the time and place thereof, and duly appear, making no default, and abide the final order of the magistrate thereon.

At the trial in the superior court, before *Ames, J.*, without a jury, it appeared that the examination of Drake, the debtor, was duly begun on the 6th of May 1864 and adjourned until May 7th at 9 o'clock A. M. The magistrate's record of what took place on the 7th of May was as follows: "On this day, immediately upon the expiration of the hour, the debtor's and creditor's counsel having been present long before ten o'clock, and the debtor being absent, the creditor's counsel asked for a default for the debtor's not being present within and at the expiration of the hour. While the matter was under discussion the debtor made his appearance, it then being about five minutes after ten o'clock, the creditor still insisting upon a default; but the magistrate declined to enter a default, and the examination was resumed by the creditor, under protest, waiving no rights. And afterwards the oath for the relief of poor debtors was administered to said Drake, and a certificate given to him thereof."

There was evidence tending to show that the debtor appeared after nine and before ten o'clock, and that the reason of his absence afterwards was that he went away to get certain books of account which had been called for by the creditor the day before, and which the magistrate had ordered the debtor to produce at nine o'clock on May 7th, and it was not shown that such absence was unreasonably or unnecessarily long for that purpose. The creditor did not request or consent to the debtor's departure for that purpose, and the magistrate did not expressly consent thereto on that morning. The magistrate testified that the debtor gave no excuse of sickness, accident or necessity for not appearing, but that it was so near the time that, the debtor's counsel being present, he considered it discretionary with him as to the entry of a default.

The judge, holding it not to be proved that the debtor failed to appear at nine o'clock in the presence of the magistrate for the continuance of the examination, ruled that his failure to return until five minutes after ten o'clock, under the circumstances, was not a breach of the condition of the recognizance

and found for the defendant. The plaintiff alleged exceptions.

*J. F. Pickering*, for the plaintiff, cited *Phelps v. Davis*, 6 Allen, 287, and cases there cited; *Whittier v. Way*, *Id.* 291; *Gilmore v. Edmunds*, 7 Allen, 360; *Russell v. Goodrich*, 8 Allen, 150; *Piper v. Pearson*, 2 Gray, 120.

*E. M. Bigelow*, for the defendant.

BIGELOW, C. J. The burden was on the plaintiff to prove a breach of the recognizance declared on. *Blake v. Mahan*, 2 Allen, 75. But the evidence failed to make out even a *prima facie* case. It did not appear that the execution debtor committed a breach of the condition by omitting to appear at 9 A. M. of the day to which the examination was adjourned. On the contrary, the court expressly found that this fact was not proved, and the case shows that there was evidence tending to prove that the debtor did in fact appear after nine and before ten o'clock on that day. Then the only evidence on which the plaintiff could rely to prove a breach was, that the debtor was not present before the magistrate precisely at the expiration of the hour of nine. But this falls short of adequate proof to charge the defendant, because it does not appear that the debtor was bound to be there at that precise moment. The case would have presented a very different question if it had appeared that the debtor had failed to appear at all until after the hour had expired. But that not being shown, it does not follow that the debtor was in default because he was absent at a subsequent time. For aught that appeared in evidence, the debtor may have been previously present. If so, the magistrate had acquired jurisdiction of the case; it was within the scope of his authority to continue the proceedings during the hour and after its expiration; he did not lose the right to take cognizance of the case by the temporary absence of the debtor; it was competent for the magistrate to suspend the proceedings for a brief period and to resume them again; and by doing so on the return of the debtor, he by implication gave a sanction to his absence, as being for a legitimate purpose. On this state of facts, it cannot be said that the debtor departed without leave, or that the magistrate had ceased to hold

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Inhabitants of Winthrop v. Farrar.

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jurisdiction of the case so that he could not discharge the debtor on his oath. See *Niles v. Hancock*, 3 Met. 568.

*Exceptions overruled.*

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### INHABITANTS OF WINTHROP vs. ALONZO FARRAR.

If the selectmen of a town, acting as a board of health, have brought a bill in equity to restrain the exercise of an offensive trade or employment which they have prohibited, under Gen. Sts. c. 26, § 52, this court have power to allow an amendment thereof, by substituting the inhabitants of the town as plaintiffs, after the term of office of the selectmen has ceased.

An order by the selectmen of a town, acting as a board of health, forbidding the exercise of an offensive trade or employment therein, need not be served by an officer.

If the selectmen of a town, acting as a board of health, after passing a general order, under Gen. Sts. c. 26, § 52, forbidding the exercise of an offensive trade or employment therein, without first giving notice to those who at the time were engaged in carrying on the same, and after giving notice of the passage of such order to a person so employed, subsequently, and before the expiration of the three days allowed by § 56 for an appeal therefrom, give notice to such person of the presentation of a petition to them, praying for the passage of a similar order upon him, and appointing a time and place for a hearing, and if they do this with the intention of preventing him from availing himself of his right of appeal from the order which they have already passed, and he is thereby so prevented, and thereby loses his right of appeal, this court will not enforce the order of the board of health by a process in equity. And if they have done this without an intention to mislead him, or to deprive him of his right of appeal, but he and his counsel have been actually mistaken in regard to his right to appeal from the order, and he has lost his appeal by reason of this mistake, and the consequences to him will be serious, this court in its discretion may and will refuse to enforce the order.

**BILL IN EQUITY** originally brought by John Belcher and others, selectmen of the town of Winthrop, acting as a board of health, there being no board of health chosen by the inhabitants of said town, praying that the defendant might be restrained from operating his works for the manufacture of kerosene oil therein.

At a former hearing, it appeared that the defendant was engaged in the manufacture of kerosene oil in Winthrop, and on the 29th of May 1862 the selectmen, acting as a board of health passed a general order, determining that the making of kerosene oil was a nuisance, and forbidding the exercise of such trade or

employment within the limits of the town ; that said order was recorded in the records of the town on the same day ; and that no prior notice was given to the defendant, but a notice of the passing of the order was served upon him on the 7th of June 1862 ; and it was determined that the selectmen had authority to pass said order, so as to be binding on the defendant, without first giving him notice, and the case was ordered to stand for a hearing. See 8 Allen, 325.

The answer of the defendant, amongst other things, admitted the carrying on of the business of making kerosene oil by him within the town ; denied that the same was a nuisance ; professed his ignorance of the alleged order ; denied that legal notice thereof had been given to him ; denied that any notice was given to him before passing the same ; averred that on the 11th of June 1862, and before the expiration of the three days allowed by Gen. Sts. c. 26, § 56, for an appeal from the order, (one of the intervening days being Sunday,) another notice was served upon him, of which a copy was annexed, informing him of the presentation of a petition to the selectmen, praying for the passage of a similar order upon him, and appointing a time and place for a hearing thereon ; that the defendant appeared, and the plaintiffs also, and a long hearing was had, occupying many days, with witnesses and counsel ; that no allusion was made by the plaintiffs to their prior order ; that the whole hearing proceeded and was conducted as if no such order had been passed, that nobody then claimed that it was operative or in force, but on the contrary the defendant continued his business of making and refining the oil, with the full knowledge of the plaintiffs, that the defendant always believed and still believes that said order and alleged notice to him were superseded and waived, and were so understood by all parties ; that after said hearing the plaintiffs declined to make any order on the petition, and then referred to the order which they had made on the 29th of May as having been made under Gen. Sts. c. 26, § 52, and said that the defendant was violating the same ; that the defendant's counsel then told the plaintiffs that if they would make an order on the petition and serve it on him he would appeal therefrom,

but they declined to do so ; all of which conduct on their part was, as the defendant believes, devised and acted by them with a view to put him in such a position as to prevent his availing himself of his right of appeal, and to take an unfair advantage of him, and to cause his rights and property to be injuriously affected or destroyed without any redress whatsoever ; that he intended to appeal and would have appealed from said order of the 29th of May, but for the service upon him of the last order of notice ; that the conduct of the plaintiffs in issuing said order of notice, and in the hearings upon the petition, and afterwards, was a waiver and supersedure of the order of the 29th of May, and was intended to be such by them ; and that the suspension of business by him would be of immense damage, the particulars of which were stated in the answer.

The case came on for a hearing before *Hoar*, J., in January 1865, and, it being admitted that Belcher and others were no longer selectmen of Winthrop, the defendant contended that the bill must be dismissed, or prosecuted by the new board of selectmen, acting as a board of health. The judge ruled that the bill was in effect brought in behalf of the town of Winthrop, and might be amended so as to make the town in form the plaintiffs ; and such amendment was allowed accordingly.

The defendant offered to prove that the person by whom the notice of the order of May 29th 1862 was served was not a constable, as by his description of himself he appeared to be ; and that, if he was a constable, he made the alleged service in Boston, which was out of his precinct ; but the judge ruled that the notice, having been ordered by the board of health and duly received by the defendant, was sufficiently served.

The defendant then, upon the allegations contained in his answer, which he offered to prove, contended that said order of May 29th, and said notice thereof, were waived and superseded by the second order, notice of which was served June 11th, and by the conduct and proceedings of the plaintiffs in respect thereto and in respect to manufacturing by the defendant ; but the judge ruled that said allegations, if proved as stated in the answer, did not constitute or show a waiver or supersedure of said

order of May 29th, nor of said notice thereof; it appearing that the defendant did not cease from the offensive trade upon the notice; and he reserved this question for the whole court.

The defendant also, upon said allegations, contended that the plaintiffs misled him by their second order and notice, and thereby caused him to omit to appeal from their first order, and that, at least, the defendant was led to make a mistake in regard to his appeal in consequence of the conduct of the plaintiffs; and that this court, as a court of equity, should not interpose in behalf of the plaintiffs, to aid them to take an unfair and unjust advantage of the mistake and omission; but the judge ruled that the said order of May 29th, unappealed from, was conclusive upon the defendant, and that the defence was not open to the defendant in this suit, it being admitted that the defendant did not, during the three days allowed by the statute for claiming his appeal, stop his manufacturing, but wholly refused to obey the order; and he reserved this question for the whole court.

The defendant also contended that this court, as a court of equity, ought not to intervene in aid of the plaintiffs in this case, because the plaintiffs had full power to enforce their order without the intervention of this court; and this question was reserved for the whole court. The arguments were had in March 1865.

*G. A. Somerby*, for the plaintiffs.

*E. D. Sohler & B. F. Brooks*, for the defendant. 1. The plaintiffs' successors as a board of health must be made parties by a supplemental bill. 2 Dan. Ch. Pr. 1594-95. Story Eq. Pl. § 340, n. The town should not be allowed to become plaintiffs. 2. The notice was improperly served. Gen. Sts. c. 26, §§ 55, 9. 3. The subsequent proceedings operated as a supersedure of the first order and notice. *Gregg v. Wells*, 10 Ad. & El. 90. *Freeman v. Cooke*, 2 Exch. 663. *Williams v. Cummington*, 18 Pick. 312. *Walrath v. Redfield*, 18 N. Y. 461. *Vidal v. Girard*, 2 How. 191. 4. The plaintiffs by their conduct have shown themselves not entitled to equitable relief. *Upham v. Wyman*, 7 Allen, 199. *Livingston v. Harris*, 11 Wend. 330. *Sturgis v. Champneys*, 5 Myl. & Cr. 97. *Plowden v. Thorpe*, 7 Clark & Fin. 162. 1 Story on Eq. § 64; 2 Id. § 885.



BIGELOW, C. J.\* 1. The amendment to the bill was rightly allowed.

2. The notice to the defendant of the order of the board of health was duly served.

3. If the defendant can prove the allegations in his answer concerning the conduct of the board of health, and their intention thereby to put him in a position to prevent his availing himself of his right to appeal, and that by reason thereof he lost his opportunity to appeal, this court will refuse to enforce the order of the board of health by a process in equity. The case is to stand for hearing on this point. After the facts are ascertained and the whole case is before us on the evidence, we shall be able intelligently to determine whether the plaintiffs are entitled to ask for the interference of this court in equity, peremptorily to restrain the defendant from the prosecution of his business.

After the above decision, voluminous testimony was taken, upon which the case was again reserved for the determination of the whole court, and was argued in November 1865. The facts found are stated in the opinion.

*Somerby*, for the plaintiffs.

*Sohier & Brooks*, for the defendant.

HOAR, J. This cause has been before us twice already, and is now presented and has been fully heard, upon bill, answer, replication and proofs. It was decided upon the first argument that the order of the board of selectmen of the town of Winthrop, acting as a board of health, which prohibited the manufacture of kerosene or other oils within the town as a nuisance dangerous to the public health, was a valid and legal order under Gen. Sts. c. 26, § 52, and binding upon the defendant, although passed without any previous notice to him. 8 Allen, 325.

The cause was then set down for hearing upon the bill, answer, replication and proofs; an amendment of the bill was allowed; and it was reserved for the whole court by the justice

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\* GRAY, J. did not sit in this case, at either hearing.

who heard it, upon rulings upon points of law which precluded the consideration of most of the evidence offered by the defendant. After argument, it was decided, 1. That the amendment to the bill was rightfully allowed; 2. That the notice to the defendant of the order of the board of health was duly served; and 3. That if the defendant could prove the allegations in his answer concerning the conduct of the board of health, and their intention thereby to put him in a position to prevent his availing himself of his right of appeal, and that by reason thereof he lost his opportunity to appeal, this court would refuse to enforce the order of the board of health by a process in equity. And the case was ordered to stand for hearing upon this last point.

A full hearing was again had before a justice of this court, and the case was again reserved for the whole court, for a final disposal of it.

We do not find it established by the evidence that the board of health had any intention to mislead the defendant, or deprive him of his right of appeal. They appear to have acted with regularity, good faith, and in strict compliance with the requirements of law. The order which they passed on the 29th of May 1862 was duly served upon the defendant on the 7th of June following, and nothing has been done by which it has since been modified, superseded or annulled. It remains, therefore, a valid and binding order, and the defence has failed upon the point on which the case was sent to a new hearing.

But a question has been argued upon the equity of the bill, as it stands for a final decree, which deserves careful consideration. It was suggested at the former argument, but was not passed upon by the court, for the reason that it could not be fully presented and understood until the whole evidence was heard.

Upon the final hearing it is now made to appear that the defendant was actually mistaken in regard to his right to appeal from the order of the board of health, and lost his appeal by reason of that mistake. His counsel, upon whose advice he relied, was under the same misapprehension.

We think it apparent that the board of health, when they gave the defendant notice of the petition for a new order, and

proceeded to a hearing under it, were themselves in doubt of the validity of their first order, and of its obligation upon the defendant, from the want of previous notice to him. The statute under which they acted was of a very stringent nature, and had not received judicial construction. The consequences are very serious, involving the entire destruction of the defendant's business. He omitted to appeal, because he and his counsel understood that the purpose and effect of proceeding upon the petition for a new order was a rescinding of the order already passed.

Under these circumstances, the question arises whether the extraordinary powers of a court of equity can be properly invoked, to enforce against the defendant by injunction the highly penal consequences of his error; and we are all of opinion that it is not a case which calls for their exercise.

The only adjudication that the defendant's works were a nuisance injurious to the public health was made by a tribunal before which he was not heard. It does not appear that any private right, adverse to his, is concerned. The statute upon which the maintenance of the suit depends, Gen. Sts. c. 26 does not expressly impose upon this court, as a court of equity the duty of enforcing the orders of the board of health made in pursuance of that chapter. Our only jurisdiction, therefore, in the premises, is the general jurisdiction of a court of equity in cases of nuisance.

Without, therefore, precluding the resort to other remedies we have come to the conclusion that equity does not require that this bill should be sustained. It is in its nature not merely remedial, but contains many of the elements of a penalty or forfeiture; and the defendant's position, however disastrous, is the result in part of a mistake.

*Bill dismissed, without prejudice.*

## WILLIAM ASPINWALL vs. ROBERT CUSHMAN.

The police court of Boston has jurisdiction of a personal action in which the damages demanded are less than one hundred dollars, if the plaintiff and defendant each has his usual place of business in Boston, and the writ is served in Boston, and each party lives in a town in which no police court has been established.

CHAPMAN, J. This action was brought in the police court of the city of Boston. The plaintiff is described in the writ as of Brookline, in the county of Norfolk, and having his usual place of business in Boston; and the defendant is described by a similar addition. The writ was served in Boston, and the defendant appeared and filed a motion to dismiss the action, on the ground that the police court had not jurisdiction of the action. Legislation, which one would suppose ought in common prudence to make such a matter too plain for dispute, has in fact made it complicated.

Police courts exist and hold their jurisdiction according to the terms of Gen. Sts. c. 116. Section 18 provides that they shall in their respective counties have the same jurisdiction as justices of the peace, of all civil actions and proceedings, and such jurisdiction shall, when the plaintiff and defendant both reside in the district, exclude the jurisdiction of other police courts and justices of the peace. By § 19, where there are two or more plaintiffs or defendants the jurisdiction of the court shall not be exclusive, unless all the parties reside in the district. These provisions would exclude the jurisdiction of the police court in Boston, if Brookline were in another police district; but it is not within any police district.

Section 41 relates to the jurisdiction of the police court in Boston. It gives that court the same jurisdiction that justices of the peace have in civil actions, and makes it exclusive when both parties reside in the district; and in actions in which the amount claimed exceeds one hundred dollars but does not exceed three hundred dollars it has jurisdiction, provided the defendants reside or have their usual place of business in Boston; thus recognizing a domicile of business as well as a domicile

of residence in the latter class of actions. But this action does not belong to that class, for the amount claimed is less than one hundred dollars. We are driven, then, to an examination of the jurisdiction of justices of the peace. Chapter 120 of the General Statutes relates to that subject, and provides that in certain cases they may direct their writs to officers of any county; but it makes no express provision for a case like the present, where both parties reside out of the county, but have places of business within it. Chapter 123, § 1, provides that transitory actions, except in cases where it is otherwise provided, if any one of the parties lives in the state, shall be brought in the county where some one of the parties lives or has his usual place of business, and if brought in any other county the writ shall abate. This provision apparently covers all cases in respect to which there is no other provision, and if so it applies to the present case. A recurrence to former legislation confirms this view. Under the Rev. Sts. c. 90, § 14, all actions were required to be brought in the county in which one of the parties lived. By St. 1854, c. 322, it was provided that actions might be brought in the county in which one of the parties lived or had his usual place of business; thus introducing for the first time the domicile of business as a basis of jurisdiction. The St. of 1856, c. 152, extended the jurisdiction based on a business domicile to actions brought by trustee process. Thus when the Gen. Sts. were enacted, the domicile of business had already been recognized for several years.

It does not follow from this that such a writ as the present one could have been sent out of the county to be served, or that it would be a sufficient service to leave a summons at the defendant's usual place of business. But those questions do not arise here, for the service was personal, and was made in Boston.

The parties have desired to obtain a judicial construction of the statutes above referred to, and have not discussed the question whether, if neither of the parties had a place of business in Boston, but the plaintiff found the defendant here and obtained a personal service of the writ, the court would have had jurisdiction. The case of *Roberts v. Knights*, 7 Allen, 449

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discusses the question in respect to aliens coming here transiently. *Motion to dismiss overruled'.*

*J. F. Barrett*, for the plaintiff.

*J. W. Bacon*, for the defendant.

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SARAH A. KING vs. ALPHEUS STETSON & another.

If at the same time when a deed of land is received the grantee mortgages it to a third person for the purpose of procuring money to enable himself to obtain his deed, and as a part of the same transaction, his seisin is only instantaneous, and the mortgage will bar his wife's dower, although she does not sign it.

WRIT OF DOWER, by the widow of Alexander King.

At the trial in the superior court, before *Ames, J.*, without a jury, it appeared that the premises were conveyed in January 1847 by one Wood to William McCollough, who on the same day mortgaged the same to Wood to secure the payment of a part of the purchase money, and in October 1847 executed a second mortgage thereof to Benjamin James, to secure a note of \$400. No deed of the premises from McCollough to Alexander King could be found, and a copy was introduced of the record of such a deed, dated December 6th 1852 and acknowledged and recorded April 6th 1853. This deed contained the following clause: "The consideration for which said deed was given was paid to said Wood by said King, but the deed was made to me by request of said King, he not being at the time a naturalized citizen." King was an alien at the time of the execution of the deed to McCollough, and occupied the premises thereafter, and the mortgage to James was made for King's benefit.

The tenant claimed title under a foreclosed mortgage from Alexander King to Elisha S. James, for \$1200, dated and acknowledged April 6th 1863. The two mortgages made by McCollough were discharged on that day. Benjamin James testified that he transacted the business of making the loan and

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taking the mortgage, and that it was his impression that King stated to him that he obtained this loan in order to enable him to discharge the two former mortgages, so that he could get a conveyance of the premises from McCollough, and that in giving the money to King he deducted the amount of the former mortgage to himself, and that this was done at the time the mortgage was discharged.

There was no other evidence that the deed to King had been delivered to him; but the judge found that there had been such delivery, and that the demandant was entitled to dower even on the assumption that the loan upon the last mortgage was procured and used for the purpose testified to by Benjamin James, and although the two former mortgages were discharged and the deed to King and King's mortgage to James were delivered all at the same time.

The judge accordingly found for the demandant, and the tenants alleged exceptions.

*D. Thaxter*, for the tenants, cited 4 Kent Com. (6th ed.) 39; 1 Scribner on Dower, 261-266; *Clark v. Munroe*, 14 Mass. 351; *Lobdell v. Hayes*, 4 Allen, 187.

*C. Blodgett, Jr.*, for the demandant, cited 2 Bl. Com. 131; 1 Cruise Dig. (Greenl. ed.) tit. vi. c. 1, § 24; *Stanwood v. Dunning*, 14 Maine, 290.

DEWEY, J. The seisin of King, the husband of the demandant, was merely transitory, and not sufficient to entitle her to dower in the lands conveyed to him by McCollough. Where the husband is seised but for an instant, the wife is not to be endowed. This principle was early applied in the case of *Holbrook v. Finney*, 4 Mass. 566, where a conveyance to the husband and a mortgage by him to the grantor were made at the same time. But it is not confined to a conveyance and mortgage between the same nominal parties. The question rather is, whether the two instruments are to be considered as parts of one and the same transaction, and no interval of time intervenes between the taking of and parting with the estate.

In *Clark v. Munroe*, 14 Mass. 351, the application of the principle that a mere instantaneous seisin excludes dower was made

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to a case where the husband received a conveyance in fee, and at the same time mortgaged the estate to a third person. In the view taken by the court in that case, all that was necessary was, that it should appear that the whole matter constituted but one transaction. In *Hazleton v. Lesure*, 9 Allen, 24, it was held that it makes no difference whether the transaction consists of one conveyance or of several, or whether they are executed between two parties or more, if all be done at the same time, and as a part of the same transaction.

Applying these principles to the facts assumed by the court to have existed here, that the loan upon the mortgage to E. S. James was procured for the purpose of discharging the two McCollough mortgages, thereby to enable King to get a conveyance of the property from McCollough; and the two mortgages made by McCollough were in fact discharged by the proceeds of such loan, and such discharge and the deed of McCollough to King and the mortgage of King to James were one transaction, and done at the same time, the facts would only present the case of an instantaneous seisin of the husband, and the wife would have no right of dower as against the mortgage to E. S. James.

*Exceptions sustained.*

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### SAMUEL C. COBB vs. ALFRED BLANCHARD & others.

A bill of lading signed by the master of a vessel by request of the charterers' agent is not conclusive evidence of the course of the voyage which the master is to pursue, if the charter contains mutual stipulations as to the course of the voyage and the mode in which the vessel is to be employed, and there are other circumstances to show that the bill of lading was not intended to have this effect.

If a vessel is chartered for a voyage from a port in Sicily to Boston, with the privilege of using a second port in Sicily within certain lay days, which are fixed, and on arriving at a port in Sicily the master takes in part of a cargo and signs a bill of lading which is prepared for him by the plaintiff's agent and which recites that the vessel is "bound for Boston," and he thereupon sails at once for Boston, without waiting for a full cargo or the expiration of the lay days, the bill of lading is not conclusive evidence, in an action by the charterer against the owner to recover damages for the injury caused thereby, to show that the master was bound thus to sail at once directly for Boston, or that he exercised good faith in so doing; but if there is evidence tending to show the contrary, the question should be submitted to the jury.



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CONTRACT upon a charter, dated October 14th 1863, by which the defendants, in consideration of \$3000, let the bark *Lucy A Nickels*, then on a voyage from Callao to Marseilles, to the plaintiff, "for a voyage from a port in the island of Sicily to Boston or New York, with the privilege of using a second port in Sicily within the lay days, if required;" "the master to sign bills of lading for any part of the cargo at any given rates of freight, if requested to do so, without prejudice to this charter party;" with a provision for thirty running lay days in Sicily, including time used in changing ports, and also forty silver dollars per day demurrage. There were also other stipulations not now material.

The declaration averred that the vessel in pursuance of the charter proceeded to Licata, a port in Sicily, where she arrived on the 9th of March 1864 and took in three thousand and ten cantars of sulphur, which composed a small part of her cargo, and then, on the 13th of the same month, contrary to the agreement of the charter and without waiting for orders, and contrary to the directions before given to the master, sailed directly to Boston with only said part of a cargo on board, and deprived the plaintiff of the privilege of bringing a valuable cargo from a second port in Sicily, Palermo, where he had one engaged.

The answer admitted the making of the charter, and averred that the vessel went to Licata in pursuance of instructions of the plaintiff or his agents, and took on board there all the cargo that was offered, or that he was requested to take on board by the plaintiff or his agents; that the master was then required by the plaintiff or his agents to sign bills of lading of said cargo as taken on board for Boston, without any mention of any intermediate port, and did sign such bills of lading, and thereby became bound to proceed with said cargo to Boston; and that he was instructed by persons acting for the plaintiff at Licata to proceed directly to Boston. The answer also denied that any instructions were given to him to proceed to any other port in Sicily, and averred that there is no port at Licata where a vessel can lie in safety, and that the cargo is taken on board in lighters

while the vessel lies in the open sea, and that she departs as soon as the cargo is on board.

At the trial in the superior court, before *Allen*, C. J., the charter was put into the case, and the following facts appeared in evidence :

In November 1861 the plaintiff had chartered the same bark for a voyage similar to that described in the present charter, and with similar stipulations; and then four thousand cantars of sulphur had been taken as cargo at Licata, for which the master signed a bill of lading, reciting that the bark was "bound for Palermo for a port of discharge." The plaintiff testified that in December 1863 he directed Gardner, Rose & Co., his correspondents in Sicily, and his agents there to conduct the voyage, to obtain a cargo in Palermo for the bark after she had taken in sulphur at Licata; and on her arrival in Boston he examined her hold and found that she was not more than one third laden; and that on her former voyage she took in a similar lot of sulphur at Licata, and then went to Palermo and filled up.

On the 1st of December 1862 the plaintiff wrote to the master of the bark, at Marseilles, that he had again chartered the bark, to proceed to Sicily to load for Boston or New York, and requesting him on his arrival to telegraph to Gardner, Rose & Co. and write them by mail, "stating when you will be ready to leave, and asking them to inform you which port to go to first, as you are to use two ports, as before, within the lay days, so that you may know just what to do when you are ready to leave Marseilles."

On the 22d of December, Gardner, Rose & Co. wrote to the master, at Marseilles, as follows: "We have in our possession the charter party of your vessel. The object of the present is to inform you that after you have discharged your outward cargo you will proceed to Licata, where our agent, Mr. William Franck, has necessary instructions as to the quantity of brimstone to be shipped on board your vessel." The master thereupon wrote to the defendants in Boston: "I have received orders to go to Licata to take brimstone, and shall probably go to Palermo to fill up, unless they give me a full cargo

of brimstone, which they have a right to do under the charter party."

On the 16th of February, 1864, Gardner, Rose & Co. wrote to William Franck, at Licata, informing him that the bark would soon arrive there, and directing him to advise them of her arrival by wire so that they might send down the needful letters of order for the sulphur she would take in at Licata; and adding, "Bill of lading to be thus filled up: 'Bound to Boston, consigned to Mr. F. C. Butman, freight \$6 p ton and 5 p c primage per ton of 13 cns.'"

The bark arrived at Licata on the 9th of March, but Mr. Franck was absent at that time, and also at the time when the above letter to him was sent, having left a power of attorney with Gregorio Salto, his chief clerk. Salto could not speak or understand English, and a son of Franck, a young man eighteen years old, acted as interpreter when there was any business with Englishmen or Americans. This son told the master of the bark that Salto had orders to put the brimstone on board, and to fill up the bills of lading for Boston, according to the instructions of Gardner, Rose & Co. in their letter of February 16th, which was shown to the master. The brimstone was accordingly put on board, and a bill of lading was prepared, which was signed by the master, stating that the bark was "now lying at Licata and bound for Boston." No special instructions had been given by Gardner, Rose & Co. other than the above, and no special instructions were given to the master by Salto or young Franck. The master thereupon, on the 13th of March, sailed directly for Boston without having any communication with Gardner, Rose & Co. A coach ran between Licata and Palermo three times a week, the passage requiring from thirty-four to forty-eight hours, and there was also a telegraphic line. Gardner, Rose & Co. had prepared a cargo for the bark at Palermo, and they testified to the current rates of freight from there to Boston. The master was one of the owners of the bark.

The plaintiff contended that this evidence, if believed, would warrant a jury in coming to the conclusion that the master had

not performed his duties under the charter; that he was bound in the exercise of a proper discretion to ascertain from Gardner, Rose & Co., at Palermo, by the means of communication at his command, before signing said bill of lading or before leaving Licata, whether it was intended that the bill should be made out as it was, and whether it was intended that he should proceed direct to Boston with only one third of a cargo in the vessel; that he had no right to leave Sicily without leave within the lay days; that the evidence showed a want of good faith and such fraud or culpable negligence on the part of the master towards the charterer as rendered him and his co-owners liable in this action; and that the instructions he received from the charterer and the other facts within his knowledge were sufficient to cause him to suspect that the instructions contained in Gardner, Rose & Co.'s letter to William Franck were not to be literally complied with, and to put him to reasonable inquiry in regard thereto. But the judge, for the purpose of raising the question of law, refused so to rule; and ruled that the master upon the facts disclosed by the evidence was authorized to proceed as and when he did to the port of Boston, and therefore the action could not be maintained; and he directed a verdict for the defendants.

The plaintiff alleged exceptions.

*E. D. Sohler*, for the plaintiff. Mr. Franck, the sulphur agent at Licata, had no authority to direct in any way the movements of the vessel. He was only an agent to buy and put on board the sulphur. And no instructions were in fact given by him or his clerks or servants to the master. The master had reason to know that it was intended that he should use two ports in Sicily, as he had done on the former voyage. He knew that Gardner, Rose & Co., at Palermo, were the plaintiff's agents to conduct the voyage; that they had conducted the former voyage; and that William Franck was absent and his son was inexperienced. He had cause to believe that it was not intended that the instructions as to the wording of the bill of lading should be literally complied with; and was put to the inquiry. He might easily have communicated with Gardner, Rose & Co. He must have

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intended to take an unfair advantage. The bill of lading has no effect to excuse him. The shippers had a right to alter it at any time before it was delivered to the consignee. *Mitchel v Ede*, 11 Ad. & El. 888, 903. *Low v. De Wolf*, 8 Pick. 101. *Allen v. Williams*, 12 Pick. 297. If the master knew that the agents had no more cargo, he should have made exertions to obtain more. *Heckscher v. McCrea*, 24 Wend. 304, 313. He was not bound to proceed directly to Boston if the shippers of the sulphur knew that he was to go by way of Palermo. *Lowry v. Russell*, 8 Pick. 360. He had no right to sail within the lay days.

*J. C. Dodge*, for the defendants. The master was not charged in any degree with the duty of a supercargo. The plaintiff undertook to direct the voyage through Gardner, Rose & Co. The master's only duty was to sail the vessel, and to obey such orders as he received. He was required to sign the bill of lading representing the vessel to be bound for Boston. The letter of Gardner, Rose & Co. gives directions that it should be made out in this form. If he had refused to sign the bill of lading, the defendants would have been responsible for any loss in consequence. The bill of lading being signed, it became the contract by which the conduct of the master was to be governed, and bound him to proceed for Boston without delay. Touching at an intermediate port, without necessity, would have been a deviation, and subjected the defendants to the consequences of a deviation. The fact that the lay days had not expired did not justify a delay. The lay days are for the benefit of the charterer, and if the charterer directs the master to sail, the master is bound to do so.

The plaintiff never requested the master to give any notice of his arrival at Licata. On the other hand, the letter from Gardner, Rose & Co. to Franck charges him with that duty. Nobody could impose on the master a legal obligation to give such notice, while sailing under that charter. *Sieveling v. Maas*, 6 El. & Bl. 670. *Harman v. Clarke*, 4 Camp. 159. *Harman v. Mant*, 1b. 161. But in fact no one ever requested him to do so. There can be no fraud or culpable negligence where there is no legal obligation. And there can be no doubt that in fact Gardner

Rose & Co. were informed of the arrival of the bark. They do not testify to the contrary.

BIGELOW, C. J. It seems to us that the error committed at the trial of this case was in withdrawing it from the consideration of the jury. The facts which the plaintiff proved had, in our opinion, some tendency to show a want of good faith on the part of the master of the vessel, and a substantial breach of the contract of affreightment into which the defendants had entered with the plaintiff.

We are unable to concur in the position assumed in behalf of the defendants, that the facts proved by the plaintiff show a valid legal defence to the action. As we understand the argument, it is this: The master of the vessel, on his arrival at the port of Licata in Sicily, received no orders from the plaintiff's agents to proceed thence to any other port in the island; but, on the contrary, he took on board there a quantity of sulphur, for which, under instructions from the plaintiff's agents, he was required to sign bills of lading, in which the vessel is described as being bound for Boston, and the merchandise laden on board is stipulated "to be delivered at the aforesaid port of Boston" to the consignee named therein. It is insisted that, inasmuch as the master was clothed with no power as supercargo or authority to direct the course of the voyage, he was bound to strict obedience of the orders which he might receive from the plaintiff or his agents; that he had no right to refuse to sign the bills of lading for the sulphur which were prepared for him at Licata; that these, when signed, became the contract by which his conduct was to be governed, and that in pursuance thereof he was bound to proceed without delay or deviation to the port of discharge therein designated. We have no doubt that this exposition of the duty of the master would be sound and reasonable if the case depended solely on the terms of the bills of lading which the master was required to sign at Licata. But the difficulty in the argument is, that the rights and obligations of the respective parties are not to be determined by these only, irrespective of the charter party and the facts and circumstances of the shipment of the sulphur at that port. It is not true, as a

general proposition, that bills of lading in all cases define, control and limit the duties and liabilities of the shipper and owner. This would be the rule, undoubtedly, where it was the only evidence of the contract of affreightment. But it is to be taken with great qualification where there is a charter party for the hire of a vessel, containing mutual stipulations regulating the course of a voyage and the mode in which the vessel is to be employed. In such a case, a bill of lading would not necessarily annul or supersede the formal contract previously entered into by the parties, and under which the cargo or a portion of it had been laden on board the vessel. It certainly would not so operate unless it was intended by the parties to have that effect. Indeed, a bill of lading is a document often issued only to be kept in the possession of the master as evidence of the quantity and kind of goods laden on board and to be transmitted to the consignee, to be used by him as proof of his right to receive certain goods at the port of destination, and of the rate of freight which he is to pay the charterer of the vessel therefor. It is seldom used to fix the terms of the shipment as between the shipper and owner, where there is a formal charter party. *Gage v. Tirrell*, 9 Allen, 299, 309. In the case at bar it is manifest that the parties did not understand that the bills of lading, which the master might be called on to sign during the voyage contemplated by the charter party, were to be regarded as authorizing or varying the terms of the charter party. It was expressly stipulated that they were to be made out and signed at any given rate of freight, without prejudice to the charter party. Nor do we understand the defendants to contend that the bill of lading of the sulphur would have finally and irrevocably fixed the course of the voyage, if explicit orders had been given to the master at Licata to go thence to Palermo. In our opinion, it would be going altogether too far to give it that effect. The fallacy which underlies the whole argument of the learned counsel for the defendants seems to us to consist in the assumption that the bill of lading signed by the master at Licata absolutely and irrevocably fixed the course of the voyage, and imposed on him the legal duty of proceeding at once on his voyage directly to Boston. No

authority was cited in support of this position, nor have we been able after some research to find one which goes to the extent of maintaining it. That it might have the effect contended for in a certain state of facts, we do not doubt; but that such is the established rule of law in all cases, or that the facts proved at the trial showed conclusively that the parties intended such to be the effect of the bill of lading which the master signed, or that he in good faith might reasonably have inferred from the circumstances of the shipment of the sulphur and the tenor of the bill of lading that it was his duty to proceed directly to Boston, we are by no means prepared to admit. *Prima facie*, the bill of lading might have warranted such a conclusion; but even that would be rebutted, if the master had reason to believe that the charterer and shippers did not intend that he should proceed directly to Boston, especially if he might fairly have inferred that he was to await orders after receiving the sulphur, and to go to another port in the island to complete the lading of a full cargo. *Lowry v. Russell*, 8 Pick. 360.

We can readily understand that there may be facts which will show that the master acted in good faith in setting sail for Boston as soon as the sulphur was put on board the vessel. He certainly was not bound to communicate the fact of his arrival at Licata to the plaintiff's agents in Palermo, or to apply to them either by mail or telegraph for orders. No such duty rested on him or the owners under the charter party; it was incumbent on the plaintiff through his agents to convey to the master directions to go to a second port in Sicily, within a reasonable time after the arrival of the vessel in Licata, if it was the plaintiff's intention to take in additional cargo. What would be a reasonable time would depend on circumstances as they existed at the time the lading of the sulphur was completed. If there was a reasonable probability that orders to go to Palermo would be seasonably received, so as to permit the vessel to go there and take in the residue of a full cargo before the expiration of the lay days stipulated for in the charter party, it would have been the duty of the master to remain long enough to receive such orders, unless there was a sufficient reason for



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an earlier departure from the port; such, for example, as the dangerous condition of the roadstead or harbor, which would render a longer continuance there hazardous. The master could not be required to await orders in a place where his vessel could not lie in safety, nor, on the other hand, could he depart suddenly without waiting a reasonable time on a mere apprehension of perils, if none was really imminent. The master well knew that the vessel was let under a charter party which allowed the hirer to use a second port in Sicily, with a privilege of thirty lay days; he was informed by the plaintiff that it was his intention to use two ports, as he had done under a previous voyage of the same vessel under a similar charter; he went to Licata, as the first port, where he took in cargo sufficient only to fill about one third of the vessel, the freight on which would be insufficient to pay the amount agreed to be paid for the hire of the vessel; he knew, by inspection of the letter sent by the plaintiff's agents in Palermo to the merchant in Licata, that the latter was only authorized to buy and put on board the sulphur, and that he had received no instructions whatever to name another port to which the vessel was to go, or in any way to direct her future movements, except so far as it might be inferred from the form in which the bill of lading of the sulphur was to be made out, and that no other instructions were in fact given as to the destination of the vessel. In this state of facts, the vessel having arrived on the 9th of March, and having completed the loading of the sulphur in the course of three days, the master left for Boston on the fourth day after his arrival, there being twenty-six lay days still unoccupied. These and other minor facts disclosed by the plaintiff's evidence tended to show that the master did not wait a reasonable time for orders at Licata, but that he set sail therefrom prematurely, contrary to his duty and the stipulations of the charter party, acting in bad faith and intending to deprive the plaintiff of the benefit and advantage to which he was fairly entitled under his contract with the owners. On the issue thus presented, we think the plaintiff had a right to ask that the jury should pass.

*Exceptions sustained.*

**WILLIAM FORSYTH vs. HENRY N. HOOPER & others.**

Upon the report of a case for the determination of the full court whether the jury were warranted in finding the verdict which was rendered therein, the weight of the evidence will not be considered, but the only question is whether there was any evidence upon which the jury could legally have found their verdict.

1. In an action to recover damages for a personal injury received in consequence of the neglect of the defendants' servant, there is any evidence tending to show that the person whose negligence is complained of was not under the control of the defendant, but was employed by one who had entered into an entire contract with the defendant to do certain work for a stipulated sum, so that the legal relation of master and servant did not exist between them, this court will not, upon a report of the case, set aside a verdict for the defendant, although the weight of the evidence may appear to have been in favor of the plaintiff.

TORT to recover damages for an injury sustained by the plaintiff in consequence of being struck by a chain thrown from the tower of the church in Arlington Street in Boston.

At the trial in this court, before the chief justice, it was admitted that at the time of receiving the injury the plaintiff was in the exercise of due care, and that the chain was carelessly thrown from the tower of the church by a person engaged in the work of hoisting a chime of bells to their places; and it appeared that the defendants agreed in writing to cast the chime of bells for the proprietors of the church, and properly to hang and place them in the belfry of the new church in Arlington Street, and to furnish all the materials and work necessary therefor. Henry N. Hooper, one of the defendants, was examined as a witness, and a portion of his testimony in chief is recited in the opinion. The rest of the evidence in the case was also reported, together with the cross-examination of Hooper; and the plaintiff contended that from all the evidence it was apparent that the defendants retained the efficient control over the hoisting of the bells to the belfry, while the defendants insisted that they had surrendered the charge of this part of the work to one Leonard, under the contract testified to by Hooper, and recited in the opinion. The evidence is not stated here, because the decision did not rest upon the weight of it.

A verdict was returned for the defendants, under instructions which were not excepted to; and the case was reported to the

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whole court, that the verdict might be set aside, if upon the evidence the jury were not warranted in finding a verdict for the defendants.

*T. Willey & A. S. Wheeler*, for the plaintiff. In this case, no fact was in dispute. The whole evidence was reported, and nothing was left except the purely legal question whether upon all the facts the defendants were liable. And upon these facts, the relation existing between the defendants and the person who raised the bells was that of master and servant. *Brackett v. Lubke*, 4 Allen, 138, and cases there cited. *Earle v. Hall*, 2 Met. 353. *Randleson v. Murray*, 8 Ad. & El. 109. The test is, had the person employed the absolute and efficient control and direction of the work, so that the employer could not interfere? And if not, the question whether the employer actually exercised any direction or control as to the manner of hoisting is immaterial.

*G. O. Shattuck*, (*H. W. Paine* with him,) for the defendants.

COLT, J. The plaintiff makes no objection to the instructions given to the jury in this case, but contends that all the evidence submitted to them would not warrant a verdict for the defendants. A motion to set aside the verdict as against the weight of evidence would ordinarily be resorted to for relief, in a case where the jury, under proper instructions, had failed to appreciate the evidence, and had rendered a verdict manifestly erroneous upon the facts presented. A party may, however, take objection in the form here chosen, and submit the verdict to the revision of the court, upon a report as a question of law. The question thus presented is quite different from that which would have been raised upon a motion for a new trial. In the latter case the inquiry would have been, whether the verdict was so manifestly against the weight of evidence as to require that it should be set aside. In this case it is, whether there is any evidence, however slight, even though contradicted and controlled by other evidence in the case, which could properly be submitted to the jury, and upon which they could legally find a verdict for the defendants. The verdict in this case may be manifestly against the weight of evidence, and yet the plaintiff may not be entitled upon this report to have the verdict set aside as a

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matter of law. *Chase v. Breed*, 5 Gray, 440. *Polley v. Lenox Iron Works*, 4 Allen, 333. *Denny v. Williams*, 5 Allen, 1. *Reed v. Deerfield*, 8 Allen, 522. Indeed, the question now presented is analogous to that which arises on a demurrer to evidence, a proceeding never common in Massachusetts, but which may be referred to as illustrating the point. In *Copeland v. New England Ins. Co.* 22 Pick. 135, Morton, J., in a learned discussion of such demurrer, says: "It seems to have been supposed to be an admission of the truth of the evidence, and the court have been called upon, supposing it all to be true, to determine what inferences may be drawn from it, and whether it would be competent for the jury upon it to find a verdict for the plaintiffs. And it has been argued that if we would set aside a verdict found for the plaintiffs on this evidence, we must render judgment for the defendants on the demurrer. But we think this is a mistaken view of the subject, and fails to give to the demurrer its legal effect. It leaves it to the court to draw inferences from the circumstances proved, and to judge of the weight of the evidence, which would be trenching upon the province of the jury. . . . The true question always raised by this kind of demurrer is, not what it is competent for the jury to find, but what the evidence tends to prove."

So in this case the only question is, whether there is any evidence proper to submit to the jury as having a tendency to support the legal proposition which exempts the defendants from liability.

In general, the master is liable in law for the negligence of the servant, through whom, in legal contemplation, he is said to act, while in his employment. When, however, the person employed is engaged under an entire contract, for a gross sum, and in an independent operation, not subject to the direction or control of his employer, the relation is not regarded as that of master and servant, but is said in modern phrase to be that of contractor and contractee; and the negligence of such contracting party, or of his servant, cannot be charged upon him for whom the work is contracted to be done. The question in these cases, whether the relation be that of master and servant or not, is

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determined mainly by ascertaining from the contract of employment whether the employer retains the power of directing and controlling the work, or has given it to the contractor. *Hilliard v. Richardson*, 3 Gray, 349. *Linton v. Smith*, 8 Gray, 147. *Brackett v. Lubke*, 4 Allen, 138.

In this case, it seems to us there was evidence, proper to go to the jury, that the plaintiff's injury was caused by the negligence of one who did not sustain the relation of servant to these defendants, and for whose acts they were not responsible. It is found that the injury was caused by the carelessness of one engaged in the work of hoisting the chime of bells, and Mr. Hooper, one of the defendants, among other things testified as follows: "I contracted with Mr. Leonard to hoist the bells; he to furnish all the hoisting apparatus and all the labor necessary to place them in their places, for which we were to pay him fifty dollars. We did nothing about hoisting the bells; Leonard's duty was to hoist the bells in the tower. If in hoisting the bells Leonard was careless, my men could not interfere; could not direct the mode of hoisting." There was evidence of other witnesses tending to prove that Leonard and his men had exclusive control of hoisting the bells, and that none of the men in the immediate employment of the defendants took charge with reference to fixing the tackle or fastenings, or hoisting the bells.

There were other expressions of the witnesses and other evidence from which it might fairly be argued that those engaged in hoisting the bells were in fact under the direction and control of the defendants. But we are not required to examine all the evidence with a view to reconcile or explain it. To do this would be to invade the peculiar province of the jury. It is enough that there was some evidence proper for the consideration of the jury, from which it might be inferred that Leonard and his men, in hoisting these bells, carried on an independent employment, in pursuance of a contract with the defendants to do a specified work for a stipulated price, and that the power of directing and controlling the work was parted with by the defendants, and given to Leonard, the contractor.

The verdict upon this evidence cannot as matter of law be pronounced unwarranted.

*Judgment on the verdict.*

**SUSAN SMITH & others vs. HENRY A. SMITH & another.**

A will, after directing the testator's debts and funeral expenses to be paid and giving legacies to his two sons, proceeded thus: "I give, devise and bequeath to my beloved wife, for her benefit and for the proper maintenance and education of my two daughters, all my personal property and all the real estate which may remain after the debts and expenses aforesaid and the legacies . . . shall have been paid, and the use, improvement and income thereof; to have and to hold the same so long as she shall remain my widow, or until her second marriage; but in case of her second marriage, when she shall have ceased to remain my widow, all the personal and real estate I hereby give, demise and bequeath to my wife aforesaid and to my two daughters, to be divided by them equally." *Held*, that by the true construction of the will the widow took the whole residue of the estate, after payment of the debts and specific legacies, in trust during widowhood; one third thereof in fee, and the other two thirds to hold during widowhood, with remainder in fee to the two daughters.

**BILL IN EQUITY** brought by the widow and two daughters of Nathaniel Smith, deceased, to obtain a construction of the will of said Nathaniel, the material portions of which are as follows:

"First: I hereby constitute and appoint my brother Benjamin Smith of Boston . . . to be sole executor of this my last will, directing my said executor to pay all my just debts and funeral expenses and the legacies hereinafter given, out of my estate.

"Second: After the payment of my said debts and funeral expenses, I give to my son Henry A. Smith two thousand dollars, to be paid within one year after my decease if so soon required by him.

"Third: I also give, devise and bequeath to my son Nathaniel Smith the sum of two thousand dollars, when he (the said Nathaniel) shall arrive to the age of twenty-one years.

"Fourth: And for the further payment of the legacies aforesaid, I give, devise and bequeath to my beloved wife Susan Smith, for her benefit and for the proper maintenance and education of my two daughters, Eliza Smith and Susan Smith, all my personal property and all my real estate which may remain after the debts and expenses aforesaid, and the legacies of the said Henry A. and Nathaniel shall have been paid, and the use, improvement and income thereof; to have and to hold the same so long as she shall remain my widow, or until her second

marriage; but in case of her second marriage, when she shall have ceased to remain my widow, all the personal and real estate I hereby give, demise and bequeath to my wife aforesaid, the said Susan Smith, and to my two daughters, the said Eliza Smith and Susan Smith, to be divided by them equally."

The will was proved in 1844. One of the sons of the testator has since died, leaving one son, and he and the surviving son of the testator are the defendants in this suit; and the plaintiffs and defendants are all the persons interested in the testator's estate. The debts and legacies to the sons were duly paid. The testator's widow entered into possession of the estate, after his decease, and has since held the same, remaining unmarried. The whole estate was appraised at \$17,401; and the debts were less than \$100.

The defendants contended that in case she should die unmarried the remainder of the estate would descend as intestate property.

The case was reserved by *Hoar, J.*, for the determination of the whole court.

*F. E. Parker*, for the plaintiffs. The will is illiterate, confused and hasty; and in construing such a will the court will make such transpositions as to make it intelligible. If read thus, the will shows an intention to dispose of the whole estate, and not to die intestate as to any part of it; and to provide for every member of the family. The testator considered the legacies to his sons as a sufficient provision for them, as appears from his express exclusion of them from any further share of his estate in the event of his widow's second marriage; and he intended to leave the residue to the widow, in trust for the benefit of herself and the daughters. That it was a trust, see *Raikes v. Ward*, 1 Hare, 445; *Thorp v. Owen*, 2 Hare, 607; *Woods v. Woods*, 1 Myl. & Cr. 401. The words of the fourth clause should be transposed, so that the words "but in case of her second marriage" should come before the words "to have and to hold the same so long as she shall remain my widow." That transposition makes the sense clear, and gives a fee to the trustee, under Rev. Sts. c. 62, § 4. The authorities sanction such

transposition. *Doe v. Allcock*, 1 B. & Ald. 137. *Brimmer v. Sohler*, 1 Cush. 118. 1 Redfield on Wills, 468. The testator is thus prevented from dying intestate as to any part of his estate; and this construction is favored by law. *Hunt v. Hunt*, 11 Met. 97. *Doe v. Hicks*, 7 T. R. 437. The other construction would give a bounty to the widow, in case of her second marriage; and in case of her not marrying again, would punish the daughters.

*H. G. Parker*, for the defendants. If the construction contended for by the plaintiffs is correct, all of the last half of the fourth clause is to be rejected as useless and without meaning; and especially the words, "to have and to hold the same so long as she shall remain my widow." But all the words of a will must be retained, if they convey an intelligible meaning. These words are universally construed to create only a life estate, at the most. *Parker v. Parker*, 5 Met. 134. *Nickerson v. Bowly*, 8 Met. 424. The words "use, improvement and income" also have a tendency to show that only a life estate was intended to be given *Bowers v. Porter*, 4 Pick. 204. *Fay v. Fay*, 1 Cush. 104. The widow and daughters take only the income, so long as the widow remains unmarried, and in case she dies unmarried the property takes the course of intestate property. *Raymond v. Morse*, 4 Gray, 248. *Phifer v. Phifer*, 6 Ired. Eq. 155. *Pryor v. Dunkle*, 2 Wash. C. C. 416.

BY THE COURT. The true construction of the will of Nathaniel Smith gives to his widow the whole residue of his estate, after payment of the debts and legacies to his sons, in trust during widowhood; one third thereof in fee, and the other two thirds to hold during widowhood with remainder in fee to the two daughters.

*Decree accordingly.*



**JOHN A. DODD & others vs. JOHN S. FARLOW & another.,**

A merchandise broker can have no implied authority, from the usage of trade, to warrant goods sold by him to be of merchantable quality; and evidence to prove such usage is inadmissible; and a memorandum made by such broker of a contract for the sale of goods is invalid and inadmissible in evidence, if he has inserted therein, without express authority, a warranty by the seller that they are of merchantable quality.

CONTRACT brought to recover damages for the non-delivery of forty bales of tanned goat skins, sold by the defendants, who were partners, to the plaintiffs.

At the trial in the superior court, before *Russell, J.*, the plaintiffs introduced evidence to show that on the afternoon of July 5th 1864 William A. Bates, a merchandise broker, asked the defendant Farlow at what rate he would sell sixty bales of tanned goat skins which had lately arrived; to which Farlow replied at \$1.25 a skin. Bates, acting in behalf of the plaintiffs and two other parties, said he would take them at that price. Farlow asked Bates who his parties were, and Bates declined to disclose them. Farlow asked if they were responsible, and if it would be prompt cash, and Bates said yes, that all the skins were taken, but he could not render the sale notes to him, because there were several parties who had not agreed upon the division of the skins; to which Farlow replied that he did not wish any delay that could be helped, as he wished to make a remittance. Bates entered memoranda of his sales in his sales-book to three parties on the same afternoon, but in two instances he left the number of skins blank. Before the above interview with Farlow, he had obtained from the defendants a memorandum of the skins, with their weight.

There was also evidence tending to show that on the morning of the 7th of July Bates arranged with the two parties their proportions of the skins, but being immediately afterwards called away he did not make out the sale notes and send them to the defendants until about two o'clock that afternoon, when the defendants refused to accept them.

The sale note to the plaintiffs was as follows, the portions

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thereof which here appear in Roman letters being printed in the blank form which was used : "Boston, *July 5th 1864*. Sold to *Messrs. John A. Dodd & Co.* for account of *Messrs. John S. Farlow & Co.* per ship *Union* from *London*, 40 *bales tanned goat skins 400 pcs ea is 16000 pcs @ \$1.25 each*. To be of merchantable quality and in good order, deliverable *from store*. Terms *cash nett*. *Wm A. Bates*, Broker in goat skins, sumac and gambia." In the margin were printed these words : "In case of damage, goods to be taken at fair allowance."

The defendants contended that they did not authorize the broker to sell the goods on the terms above stated, but only authorized him to sell for cash to be paid the next day, and they testified in contradiction of the plaintiffs' evidence.

It appeared that prior to the 5th of July an agent of the plaintiffs had twice examined the skins, though not sufficiently to ascertain the character of all of them. And the plaintiffs were allowed, under objection, to introduce evidence to show that, by the usage of trade in Boston in case of sales of this kind of goods, they were impliedly warranted to be of merchantable quality, and that by custom when merchants sold such goods through a broker he had authority to insert words to this effect in his memorandum, unless forbidden to do so.

The defendants asked the court to rule that the words in the sale note showing the quantity sold were a warranty that there was that number of skins, which the broker was not authorized to insert unless expressly authorized; that he was not authorized to insert the words "of merchantable quality," unless expressly authorized; that if it is a usage for brokers in tanned goat skins, when nothing is said on the subject of warranty and the buyer has an opportunity for examination, to insert in the memorandum a warranty of merchantable quality, such usage is unauthorized in law; and that the words in the margin of the sale note were a material part thereof, which the broker had no authority to insert unless expressly authorized. These requests were refused, and the judge instructed the jury that the broker was not authorized to insert the words "of merchantable quality," unless expressly authorized, or unless under the usage

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set up by the plaintiffs the jury should find implied authority to insert it.

The defendants then requested the court to instruct the jury that, if they should be satisfied that the contract of July 5th was a contract for one sale of all the skins, then the three sale notes were not in conformity to the contract, and there was no memorandum of the contract signed by the parties. The judge gave this instruction, with this addition: "But if the defendants, knowing that there might be more than one purchaser, did not ask or care how many purchasers there were, and if the broker did not tell Farlow or give him to understand that there was only one purchaser, and especially if the broker informed him that there was more than one party purchasing, then the defendants cannot avail themselves of the defence that there was more than one purchaser."

The jury returned a verdict for the plaintiffs, with \$1854 damages; and the defendants alleged exceptions.

*H. W. Paine & R. D. Smith*, for the defendants, cited, as to the usage relied on, *Eager v. Atlas Ins. Co.* 14 Pick. 145; *Bolton v. Colder*, 1 Watts, 360; *Snowden v. Warder*, 3 Rawle, 101, *Sloever v. Whitman*, 6 Binn. 416; *Coze v. Heisley*, 19 Penn. State R. 243; *Donnell v. Columbian Ins. Co.* 2 Sumner, 367 *Thompson v. Ashton*, 14 Johns. 316; *Beirne v. Dord*, 1 Selden, 101.

*C. A. Welch*, for the plaintiffs, cited, upon the same point, *Dwight v. Whitney*, 15 Pick. 179, 183; *Upton v. Suffolk Co Mills*, 11 Cush. 586, 589; *Goodenow v. Tyler*, 7 Mass. 36, 38 40; *Syers v. Jonas*, 2 Exch. 111; *The Monte Allegre*, 9 Wheat. 616, 644; *Andrews v. Kneeland*, 6 Cow. 354; *Alexander v. Gibson*, 2 Camp. 555.

BIGELOW, C. J. We do not deem it necessary to determine all the questions raised at the trial of this case, because it seems to us that there is one objection to the validity of the memorandum of the contract which is fatal to the plaintiffs' claim. It is conceded that the broker who made the contract had no express authority from the defendants to warrant the articles sold to be of merchantable quality. Nevertheless such a warranty was

inserted in the memorandum or sale note delivered to the plaintiffs by the broker.

It was contended, on the part of the plaintiffs, that an authority to make such warranty is derived from the usage of trade; and evidence was offered from which, under instructions from the court, the jury have found that an authority was implied, in case of a sale by a broker of the kind of merchandise described in the memorandum, to insert a warranty of their quality which would be binding on the vendor. But notwithstanding this finding, we are clearly of opinion that the plaintiffs are not entitled to recover, because the alleged usage on which the jury have based their verdict is unauthorized by law, and cannot be regarded as valid. It contravenes the principle, which has been sanctioned and adopted by this court upon full and deliberate consideration, that no usage will be held legal or binding on parties which not only relates to and regulates a particular course or mode of dealing, but which also engrafts on a contract of sale a stipulation or obligation which is different from or inconsistent with the rule of the common law on the same subject. *Dickinson v. Gay*, 7 Allen, 34, 37.

Such, as we understand it, was the effect of the usage proved at the trial. It consisted of two parts or branches, each of which was essential to the one integral usage on which the plaintiffs relied; and unless both can be maintained as legal and valid, the entire usage must fall to the ground. The first branch was in substance this: that, in a sale of the particular kind of goods which was the subject of controversy in this case, although nothing may have been said in making the bargain on the subject of warranty or as to the quality of the merchandise, and notwithstanding the buyer may have had opportunity to examine it, there was nevertheless a warranty tacitly implied that the article was merchantable. The second branch of the usage was a sequence of the first, and was this: that where the same kind of goods was sold through the agency of a broker, he had, by implication derived from usage, authority to give an express warranty of the articles and to insert it in the memorandum, unless forbidden to do so by the vendor. The proof of usage,

therefore, was confined in terms to cases where a warranty as between vendor and purchaser would be implied if the sale was made directly, without the intervention of a broker, and it was only as a part of or consequence of this usage that a broker was authorized to insert an express warranty in the sale note when employed to sell the same kind of merchandise. It was not contended that any distinct and independent usage existed by which a broker had authority to give such warranty, but only that as by usage a warranty would be implied in a sale of such goods between vendor and purchaser, so an authority by the same usage was given to the broker to insert an express warranty in the memorandum.

Regarding therefore the usage as an integral one, the decisive objection to its recognition is, that it embraces an element directly contrary to the ancient and well established rule of the common law, that a vendor cannot be held responsible for the quality of goods sold, if he make no warranty or representation concerning their nature, condition or merchantable value. In other words, it abrogates, to a certain extent, the maxim *caveat emptor*, and puts on the vendor the burden of warranty, although he may be ignorant of the quality of the articles, or may have had no means of ascertaining their condition or value, and may have had no intention of selling the article with warranty. Such a usage is very like the one relied upon in the leading case of *Thompson v. Ashton*, 14 Johns. 316, which was held invalid and of no effect because it tended to introduce vagueness, confusion and uncertainty into the rules regulating the rights and obligations of parties under contracts for the sale of merchandise.

But we do not think that it would avail the plaintiffs, or add anything to the validity of the usage which they set up in support of the contract of sale, if we could separate its two parts or branches, and consider the case as depending on that portion of the usage only by which an authority is implied in a broker to insert an express warranty of an article in a sale note when no such authority has been conferred by the vendor. The difficulty in the way of sanctioning and adopting in a court of law

that part of the usage seems to us to be insuperable. It is liable to the grave objection that it is unreasonable, and so contrary to the ordinary rules by which the relation of principal and agent is regulated, that it cannot be presumed to have been in contemplation of a vendor in employing a broker to make a sale of merchandise. Even if the usage was known to the vendor, he would have a right to disregard it, and to disavow a contract made in conformity to it. *Seccomb v. Provincial Ins. Co.* 10 Allen, 305, 314. We have very great doubt whether a usage can be regarded as reasonable which invests an agent with power to bind his principal by a contract into which the latter had not by any word or act, either express or implied, of his own, authorized the agent to enter. The effect of the usage in question is not merely to give authority to a person acting as broker for another to make a sale in the ordinary way with the usual stipulations and incidents of such a contract; but it extends the authority of the agent and invests him with power to insert a special agreement, which fastens on the vendor a liability not usually included in a sale of chattels in the regular course of business.

But the objection does not stop here. By the terms of the usage, as proved at the trial, the authority of the broker to give a warranty is implied, wholly irrespective of the nature and condition of the particular property which may be the subject of the contract, without any regard to the facts and circumstances under which the sale is authorized to be made. If this usage is upheld, then a broker may give a warranty binding on his principal, although the latter may have authorized goods to be sold, not for a sound price, but at a rate far below the market value of a merchantable article; so he may be held liable on his broker's warranty, although at the time of the sale he may never have seen the goods, and knew nothing of their condition or value, or even when he knew that they were an inferior article, or had been greatly damaged; and this too where the vendee may have seen and examined the article and had full opportunity to become acquainted with its quality and condition. The dangerous consequences which would follow if such usages

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were permitted to interfere with the operation of established legal principles and to control the rights and obligations of parties under contracts are too plain and palpable to allow us to hesitate in rejecting them as unreasonable and invalid.

We are inclined to think that the instructions were defective in not submitting to the jury in a clear and precise form the question of the authority of the broker to make three separate and distinct sales to different persons, instead of one sale of the whole lot of merchandise to one person. But it is unnecessary to dwell on this part of the case, as in the event of another trial the case may present itself in an aspect which will render this part of the controversy unimportant.

*Exceptions sustained.*

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WINNISIMMET COMPANY *vs.* MORRILL WYMAN & others.

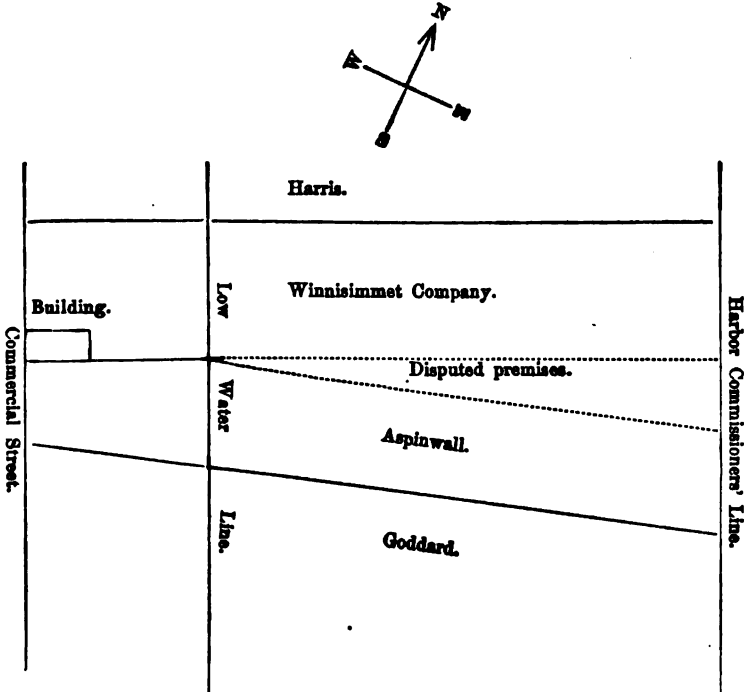
HELEN E. SMITH *vs.* WINNISIMMET COMPANY.

A., B., C. and D. owned adjoining parcels of land extending to the low water line, at the north end of Boston, which is a headland. A straight line divided the land of A. from that of B., and another straight line, parallel to the former, divided the land of B. from that of C. The line between C. and D. was not parallel to the other lines, but diverged so that the land of C. grew wider as it approached the water. The legislature granted leave to A. to extend a wharf upon his land straight into the harbor, to a line fixed by the harbor commissioners; and on the same day granted leave to B. and C., respectively, to extend the wharves upon their lands to said commissioners' line; and the next year made a like grant to D. C. and D., by an indenture between themselves, agreed that the line between them should continue to the commissioners' line in the same direction with their line on the shore. Immediately after the legislative grants to B. and C., they respectively built a structure and drove piles on the assumption that the true line of division between them was a continuation, in a straight line, of the division line between them on the shore; thus leaving B.'s two lines parallel to each other throughout their entire length. Upon a controversy arising between B. and C. twenty-five years afterwards, there being no evidence to show the form of the headland at that particular place, *held*, that the projection of the line between them should continue in the same direction with that on the shore, and that B. was not entitled to have his premises expand as they approached the commissioners' line.

THE first of these actions was a writ of entry to recover a parcel of land at the north end of Boston, situated between low water line and the line of the harbor commissioners in Boston

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Harbor. The second was a cross action, relating to the same premises. Both actions were commenced in March 1864. The situation of the premises is shown by the following plan :



At the trial in this court, before *Gray, J.*, without a jury, the following facts appeared :

On the 19th of April 1837, the Winnisimmet Company were the owners in fee of a strip of land, extending from Commercial Street, above the original high water mark, to what was then low water mark, which strip was of equal width throughout, and on which they had a wharf, dock and landing-place ; and by *St. 1837, c. 211*, passed on that day, they were authorized to extend the same into and over the tide waters of the harbor to the commissioners' line. On the same day, Samuel Aspinwall, whose title the tenants in the first action now have, was the owner in fee of the estate adjoining on the southeast, and was authorized in like manner by *St. 1837, c. 212*, to extend



his wharf. By *St.* 1837, c. 191, passed on the 18th of April 1837, a similar grant was made to Isaac Harris, the owner of the wharf estate adjoining that of the Winnisimmet Company on the northwest. And by *St.* 1839, c. 95, passed on the 5th of April 1839, a like grant was made to Nathaniel Goddard, the owner of the wharf estate adjoining that of Aspinwall on the southeast; provided, however, that Goddard should not have or claim any right to extend his wharf or to use and occupy the flats "beyond a line drawn in continuation of the boundary line dividing the lands and flats of the said Goddard from the lands and flats of Samuel Aspinwall." All these statutes were given in evidence at the hearing.

On the 15th of April 1836, Aspinwall and Goddard, who were then seised of their estates in common, made partition thereof by mutual releases, "by a line which runs from said street one hundred feet, and thence continues a little more southerly to low water mark," and stating that "the width of said land," so granted to Aspinwall in severalty, "as measured at successive distances of one hundred feet from said street, is thirty-one feet, thirty-seven feet three inches, forty-three feet six inches, and forty-nine feet nine inches, as shown on a plan taken by S. P. Fuller, April 8, 1836." And by an indenture made in 1839, after the passage of *St.* 1839, c. 95, Aspinwall and Goddard granted to each other the flats lying respectively southeasterly and northwesterly "of a line drawn in continuation of the division line established by said partition deeds between them."

It appeared that the north end of Boston, including the estates of the Winnisimmet Company and the tenants, was a headland; that the division lines between the estates of the Winnisimmet Company and Harris, and between the estates of Aspinwall and Goddard, were marked by permanent structures; and that so much of the commissioners' line as was embraced between these two division lines was larger than the corresponding line at low water mark.

The matter in dispute was the course of the boundary line between the grants made by *Sts.* 1837, cc. 211, 212. The tenants in the first action contended that it ran in the same direction as

the line dividing the estates already owned by the grantees at the time of the grants. The Winnisimmet Company contended that the width of the two estates at the commissioners' line must be proportioned to their width at low water mark, to effect which the division line must be deflected more to the eastward.

Alexander Wadsworth, a surveyor called by the Winnisimmet Company, testified that, supposing the land between low water mark and the commissioners' line to be divided among the proprietors of the headland in proportion to the fronts of their respective estates at low water mark, the lines between the estates of the Winnisimmet Company and Harris, and between the estates of the tenants in the first action and Goddard, and the line proposed by the Winnisimmet Company between their estate and the said tenants, would not give to the Winnisimmet Company more than their fair proportion of the flats. But he also testified that he had made no general examination of the headland to show what the direction of the division lines should be. And his testimony was rejected, as immaterial, as involving an opinion upon a question of law, and because, so far as it involved a question of fact, he had not shown himself to have sufficient knowledge to testify.

At the southerly corner of the estate of the Winnisimmet Company stood a brick house, the face of the southeasterly wall of which was upon the boundary line between the estates of the Winnisimmet Company and of Aspinwall. In 1837, soon after the legislative grants to them, the parties did the following acts upon what they believed and intended to be the division line between their estates, and which was in fact the line as now claimed by the said tenants, and corresponded with the southeasterly line of the brick house, and with the descriptions in the deeds of Aspinwall and Goddard in 1836, and the plan of S. P. Fuller therein referred to. The Winnisimmet Company cut off a portion of a wooden wharf, which extended from their estate over Aspinwall's, and, "sighting by the brick house," built a stone wharf, beginning at about one hundred and seventy feet from Commercial Street, and extending to about four hundred and forty feet from that street and beyond

ow water mark. Aspinwall put down a line of piles about ten feet apart, with continuous caps of timber, from the end of this stone wall, and in a line with the wall of the brick house, to the commissioners' line, there connecting with a like line of capped piles across the end of his front. The Winnisimmet Company built a new ferry slip, consisting of a double row of oak piles, with its easterly end at the outer end of the division line; and their agent, by Aspinwall's permission and consent, put down a cluster of piles half on each estate, at that end of the line, understanding it to be in a line with the brick wall.

Upon this evidence the judge ruled that the line as claimed by the tenants in the first action was the true line; and reported the cases for the determination of the whole court. Evidence upon a question of disseisin was also reported, but became immaterial in the decision.

*G. O. Shattuck & G. Putnam, Jr.*, for the Winnisimmet Company. The legislative grants to the Winnisimmet Company and Aspinwall must be construed together, and so construed as to give to each a width at the harbor commissioners' line proportionate to that which they held at low water. The northwest boundary of the grant to the company was fixed by the grant to Harris. The line between Aspinwall and Goddard, though not fixed at the time of the grants now in controversy, may well be taken to be that which was subsequently fixed upon by *St. 1839, c. 95*, and by the indenture between the parties. It appears then that by the simultaneous grants of the legislature to the Winnisimmet Company and Aspinwall, the seaward front was longer than the previous fronts of the owners at low water mark. In construing such riparian grants, the division lines between the grantees are to be extended so as to give them the same proportionate lengths on the new fronts that they formerly held on the old, without reference to the direction of the old division lines. *Deerfield v. Arms*, 17 Pick. 45. *Walker v. Boston & Maine Railroad*, 3 Cush. 22, 25. *O'Donnell v. Kelsey*, 4 Sandf. R. 202. *Commonwealth v. Roxbury*, 9 Gray, 451, and *note*. The fact that the parties ignorantly adopted an erroneous construction, and established a division line in accordance therewith, does not estop

either of them from claiming according to the true boundary. *Liverpool Wharf v. Prescott*, 7 Allen, 494, and cases there cited.

*H. W. Paine & G. W. Phillips*, for the tenants in the first action, cited *Curtis v. Francis*, 9 Cush. 442, 466; *Dall v. Brown*, 5 Cush. 289, 293; *Dawes v. Prentice*, 16 Pick. 435, 441; *Sparhawk v. Bullard*, 1 Met. 100; *Stone v. Clark*, Ib. 380; *Valentine v. Piper*, 22 Pick. 95; 9 Gray, 523; *Wakefield v. Ross*, 5 Mason, 23.

CHAPMAN, J. The demandants in the first of these actions and the tenants in the second, though differently named, are by amendment the same parties, and the cases have been heard together.

The parties claim title to the premises under grants from the Commonwealth. The Winnisimmet Company owned a lot on the shore, which extended to low water mark. It was bounded by straight lines which are nearly or quite parallel, and on the northwesterly side it adjoined the land of Isaac Harris, and on the southeasterly side the land of Samuel Aspinwall, whose title afterwards passed to Wyman and others. By St. 1837, c. 191, the legislature granted to Harris authority to extend his wharves straight into the channel, as far as the line which had been established by the commissioners appointed under the resolve of 1835 for the survey of Boston Harbor. By St. 1837, c. 211, passed the same day, the Winnisimmet Company were authorized to extend their wharves to the commissioners' line; and by c. 212, passed the same day, Aspinwall was authorized to extend his wharf to the same line. By the terms of the grant to Harris, his southeasterly line, adjoining the Winnisimmet Company, was to be straight. It is also to be presumed that the southeasterly line of the Winnisimmet Company, adjoining Aspinwall, was to be extended to the commissioners' line without deflection, unless some fact appears to show a contrary intention.

One fact which is relied on to show such contrary intention is, that the north end of Boston, including the estates of both the parties to these actions, was a headland; and on a headland where the shore is convex the curvature makes it often necessary

to deflect the boundary lines as they extend outwards into the sea, in order to make a proper division between adjoining lots thus extended. But the shore of a headland seldom curves with any uniformity. In some parts there may be a straight shore, and in others there may be coves and creeks upon which several conterminous lots are bounded, and therefore no uniform rule can be laid down. *Deerfield v. Arms*, 17 Pick. 45. *Walker v. Boston & Maine Railroad*, 3 Cush. 1. It does not appear that the lot of the Winnisimmet Company was situated on a convex shore; and from the mere fact that it was situated on a large headland, which included many lots, we cannot say that the easterly line should be produced otherwise than as a straight line to its outer boundary at the commissioners' line.

But the company rely upon another fact. Nathaniel Goddard owned the lot next southeasterly of Aspinwall, and by St. 1839, c. 95, the legislature granted to him the right "to extend his wharves to the commissioners' line," bounding him on the northerly side by a line drawn in continuation of the line between him and Aspinwall, and on the southeasterly side by a line drawn in continuation of the boundary line between him and Joseph W. Revere. The lots of Aspinwall and Goddard were both considerably wider at low water mark than at the opposite end, and of course they would continue to widen by the extension of their lines without deflection to the commissioners' line. The lot of Goddard is very much wider at the commissioners' line than at the opposite end, and by a subsequent indenture he and Aspinwall established the line between themselves. By this line the lot of Aspinwall continues to grow wider as it approaches the commissioners' line. But neither the grant to Goddard nor the subsequent establishment of the line between him and Aspinwall can affect the construction of the grant to the Winnisimmet Company. In Goddard's grant the legislature defined his boundaries, and he and Aspinwall had a right to establish the line between them arbitrarily, as they might think proper.

At this late day it would probably be impossible to ascertain the exact position of the original shore at the place in controversy. Neither party has attempted to do it in this case. For

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this reason it is useful to know what the Winnisimmet Company and Aspinwall did in respect to the establishment of the extended line between them, and the occupation of their respective lots, soon after the grants were made, for they must be presumed to have known the facts and their own legal rights at that time. Such evidence is held to be admissible, and to be entitled to great weight in construing the grants. *Sparhawk v. Bullard*, 1 Met. 95. *Stone v. Clark*, lb. 378. *Jennison v. Walker*, 11 Gray, 423, 427.

It appears that they established a line produced without deflection, drove piles upon it, and occupied accordingly. The Winnisimmet Company are not estopped to show that they made a mistake in assenting to this line, but they offer no evidence tending to show such mistake. We do not see, upon all these facts, any ground for interpreting the grant to the company so as to require a deflection of their line, in order that their lot may be widened at its outward end.

Judgment must be for the tenants in the first action, and for the demandant in the second action.

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### MARIA L. SAWIN & others vs. WILLIAM D. MARTIN.

One who is duly charged with having fraudulently received, concealed, embezzled and conveyed away property belonging to the estate of an insolvent debtor, may, under Gen. Sta. c. 118, § 107, be examined in the court of insolvency on oath, touching the same, and required to disclose all such matters as may not tend to criminate him.

**HABEAS CORPUS.** At the hearing in this court, before the chief justice, it appeared that one of the assignees in insolvency of the estate of George H. Sawin made a complaint on oath to the judge of insolvency, charging the wife of said Sawin and her brother and sister with having fraudulently received, concealed, embezzled and conveyed away property belonging to said estate; whereupon they were cited into that court and ordered to submit to an examination on oath upon the matter

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of the complaint, and refused to submit to such examination. They were thereupon severally taken in custody by the respondent, who was a constable, under a mittimus signed by the judge of insolvency.

*G. Sennott*, for the petitioners.

*R. M. Morse, Jr. & J. C. Ropes*, for the respondent.

HOAR, J. It has not been claimed on behalf of the respondent that the petitioners can be compelled to answer any interrogatory proposed, when the answer would tend to criminate them. The provision in the twelfth article of the bill of rights, that no subject shall "be compelled to accuse, or furnish evidence against himself," is too plain and explicit to admit of any debate upon this point. But the question which is presented for decision upon the return to these writs of *habeas corpus* is twofold:—1. Whether the objection, which the petitioners made to submitting themselves to examination under the order of the judge of insolvency, was properly taken; and, 2, whether the one hundred and seventh section of the one hundred and eighteenth chapter of the General Statutes is inoperative and void, because in conflict with the constitutional guaranty above recited. And upon both grounds we are of opinion that the petitioners have failed to establish their right to relief by this process, and must therefore be remanded to the custody of the officer, for the further execution of his precept.

It appears by the returns to the writs of *habeas corpus* that the petitioners were committed to the jail of the county of Suffolk by the order of the judge of insolvency, having been duly cited to appear and submit themselves to an examination upon oath, upon the complaint made to him upon oath that they were suspected of having fraudulently received, concealed, embezzled and conveyed away the money, goods, effects and estate of an insolvent debtor, and having refused to submit themselves to such examination. The proceeding is expressly authorized by the statute. Gen. Sts. c. 118, § 107.

1. In refusing to be sworn and submit themselves to examination, the petitioners have mistaken the time at which they could awfully interpose the objection upon which they rely. It

is not yet apparent that the complaint against them would involve any criminal charge. And if it should, the time to take the objection is after they have been sworn, and when their refusal to testify for that reason would be made upon oath, and in the due course of their examination.

2. But when they shall have submitted themselves to examination, we do not think that it yet appears that their answering the questions proposed would tend to criminate them. Unless they were guilty of some act which the law makes criminal, they are not entitled to be excused from answering fully in respect to having fraudulently received, concealed or conveyed away the property of the insolvent, which ought to go to the assignee for the benefit of the creditors. If the complaint includes a criminal act among those charged, it is no reason why the person cited to testify should not be required to disclose the truth respecting other matters which are not criminal. That the party under examination could not testify upon some of the subjects of complaint and investigation, without criminating himself, is no ground of objection to testifying on other and distinct subjects of inquiry.

Nor do we think that the word "embezzled," in the statute, is to be construed as referring to a criminal embezzlement. It is not to be supposed that the legislature intended that a person charged with a crime should be compelled to answer under oath whether he is guilty of it. Its meaning is rather to be found in the words with which it is connected, and as importing an act which is a violation of a civil right, and not the technical offence of embezzlement under the statute. The meaning and purpose of the section under consideration were fully explained in the exposition of *St. 1846, c. 168, § 1*, from which it was taken, in the opinion given by Chief Justice Shaw in *Harlow v. Tufts*, 4 Cush. 448. The right of the legislature to require a disclosure in answer to a complaint under that statute was fully sustained by this court; and the petitioners are bound to submit themselves to examination until they can state, as an objection to some specific interrogatory, that an answer to it would tend to criminate them.

*Petitioners remanded.*



**SOUTH SCITUATE SAVINGS BANK vs. DONALD ROSS & others.**

If land is devised to a person, to have and to hold the same to the sole, separate and exclusive use of a married woman, her heirs and assigns forever, with a provision that she may reside thereon if she chooses during her life, and in case she should leave it then that the trustee may "lease or sell or make such other disposition of the premises, or any part thereof, as she may in writing authorize;" and the land is afterwards conveyed by such trustee to the woman and her husband; a conveyance thereof by her and her husband will vest a valid title in the grantee.

**WRIT OF ENTRY** to foreclose a mortgage of certain parcels of land in Boston.

At the trial in the superior court, before *Brigham, J.*, without a jury, only one parcel was in dispute, concerning which the following facts appeared: Isabella Ross by her will, which was admitted to probate in 1844, devised the same in these words: "I give and devise my house, and the lot of land on which it stands, lying and being on or near Sheafe Street, in Boston, with all the privileges and appurtenances thereto belonging, unto the said Alexander McLennan, my said executor, and his heirs and assigns, to have and to hold the same to the sole, separate and exclusive use of the said Betsey, the said wife of the said Gilbert Mizner, her heirs and assigns forever. And my will is that my sister, the said Betsey, and her said husband, the said Gilbert Mizner, shall and may, if she so choose, continue to reside in the said house and tenement wherein they now reside, for and during her life; and in case she shall think proper to quit the said house at any time after my decease, then my will is that the said McLennan, the said trustee for the purpose aforesaid, or his successor as trustee, have full power to lease or sell or make such other disposition of the premises, or any part thereof as she, the said Betsey, may in writing authorize."

In October 1853 McLennan conveyed the premises to Gilbert Mizner and Betsey, his wife; and on the same day said Gilbert and Betsey, in her right, mortgaged the same to the plaintiffs, to secure a promissory note.

Upon the foregoing facts, default having been made in the

payment of the note secured by the mortgage, judgment was ordered for the plaintiffs; and the defendants alleged exceptions.

*J. P. Timony*, for the defendants. The will creates a trust in McLennan with power to convey on two conditions; 1, That Betsey should think proper to quit the house; and, 2dly, that she should in writing authorize him to convey. These conditions must be strictly construed and precisely performed, in order to give validity to a deed from the trustee. Not having been so performed, the deed was void.

*N. C. Berry*, for the plaintiffs, was not called upon.

BIGELOW, C. J. The right of the demandants to maintain this action is clear. The legal title is vested in them by the conveyances under which they claim. It is immaterial whether the devise in the will of Isabella Ross be regarded as creating a use in the executor which became immediately executed in her sister, Betsey Mizner, and her heirs, or a trust in the executor to hold the estate for the use and benefit of said Betsey as *cestui que trust*. If the former is the true construction, then the conveyance in mortgage to the demandants by said Betsey and her husband vested a valid title in fee and in mortgage in the demandants; if the latter is to be deemed the effect of the devise, it was a trust under which the *jus habendi* and *jus disponendi* were both intended to be in the *cestui que trust*, and the conveyances by the trustee and the *cestui que trust* under which the demandants claim passed a valid legal title to them. Hill on Trustees, 175, 278, 282. Co. Litt. 290 *b*, note.

Besides; it is clear that the testatrix intended that the entire beneficial interest in the estate devised should be in her sister. A conveyance in mortgage by the latter by a deed in which her husband joined, preceded by a conveyance by the trustee to her of the legal title, not only passed a legal interest in the demanded premises; *Titcomb v. Currier*, 4 Cush. 591; but seems to have been in conformity with the trust, if any, which the testatrix declared by her will

*Exceptions overruled.*

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Bennett & another v. Shackford & another.

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**WILLIAM W. BENNETT & another vs. AMAZIAH G. SHACKFORD  
& another.**

No mechanic's lien exists for labor performed by the owners of a planing-mill in sawing and planing lumber in their mill, with no agreement between them and their employer as to the use to which the lumber shall be put; although it is in fact afterwards used in a building which he is erecting for another person under a contract.

PETITION to enforce a lien under the mechanics' lien law.

It was agreed in the superior court that the petitioners are the proprietors of a planing-mill, and the respondents were owners of an estate on Paris Street in East Boston; that the work described in the petition was done by the petitioners by machinery in their planing-mill, at "the request of William Wentworth, who under an agreement with the respondents was erecting buildings on their said estate; that the work consisted in sawing and planing lumber preparatory to its use in the building of the respondents, and that the same was actually used therein." There was no other question in the case except that arising on the above facts; and judgment was ordered for the petitioners, and the respondents appealed to this court.

*N. Morse*, for the respondents.

*H. W. Paine*, (*A. Cottrell* with him,) for the petitioners.

CHAPMAN, J. By Gen. Sts. c. 150, § 1, any person to whom a debt is due for labor performed or furnished in the erection of any building by virtue of an agreement with or consent of the owner, or any person having authority from or rightfully acting for such owner in procuring or furnishing such labor, shall have a lien upon such building to secure the payment of his debt. By § 4, the owner of the building may prevent the attaching of any lien for labor thereon not at the time performed, by giving notice in writing that he will not be responsible therefor. By §§ 5, 7, the lien is dissolved unless the person doing or furnish ing the labor shall file a statement and bring a suit within a certain period "after he ceases to labor or furnish labor for such building."

It appears by the agreed statement of facts that the work in

question was done by the petitioners at the request of William Wentworth; and though it is added that he was then erecting buildings on the estate of the respondents under an agreement with them, yet it is not stated that he agreed with the petitioners that the lumber on which this work was done should be appropriated to these buildings. In the absence of any such agreement he had a right to appropriate it as he pleased, and was not bound to use it in these buildings. We cannot infer that the respondents authorized him to make such an agreement, or that he made it or pretended to make it on their behalf. We must regard the petitioners as laboring for him on his own account, and as having no connection with the appropriation of the lumber to the respondents' buildings, and consequently as having no lien upon the buildings, within the words or intent of the statute. This view is strengthened by the fact that the work was not done in or about the buildings, but at the petitioners' planing-mill, which does not appear to be so situated that the respondents could by the use of reasonable diligence know that the petitioners were performing labor that was afterwards to be appropriated to their buildings and therefore they could have no means of giving the notice which the fourth section authorizes them to give to all laborers who may be entitled to a lien. If the petitioners could establish a lien upon the facts agreed, this provision would be nugatory.

This view is further strengthened by referring to the fifth and seventh sections. The labor of the petitioners done at their mill, under a contract that does not appear to have had any reference to the buildings, cannot be properly regarded as having been performed on the buildings, or in their erection, within the meaning of these sections, and therefore it cannot reasonably be said that there was a time when they "ceased to labor on the buildings," within the meaning of these sections. The labor was not of the character contemplated by these sections.

*Judgment for the respondents.*

CAROLINE SALTONSTALL & others vs. CHARLOTTE SANDERS & others.

A testator bequeathed the residue of his estate to his executors in trust to hold and invest the same and the income thereof, and appropriate so much or the whole of the principal or income as they might think proper "to the furtherance and promotion of the cause of piety and good morals, or in aid of objects and purposes of benevolence or charity, public or private, or temperance, or for the education of deserving youths," and gave said trustees and their successors "full power, discretion and authority to appropriate and expend said income or capital in such manner as in their judgment may best promote the objects above mentioned." *Held*, that by "objects and purposes of benevolence or charity, public or private," the testator intended general relief of the poor, either through public institutions or almsgiving by the agency of individuals; and that this was a good charitable bequest.

BILL IN EQUITY, brought by certain of the next of kin and heirs at law of Charles Sanders, late of Cambridge, deceased, against the executors of his will, and certain others of the next of kin and heirs at law, who refused to join as plaintiffs, seeking to have the residuary clause of his will declared void, and the residue of the estate administered as in case of intestacy. The residuary clause was as follows:

"All the rest and residue of my estate I give and bequeath to Charlotte Sanders, James C. Merrill and Leverett Saltonstall, my executors hereinafter named, and the survivor of them, their and his executors, administrators and assigns, as trustees, in trust to hold and invest the same and the income thereof, in such manner as may seem to them expedient; and so much or the whole of the principal or of the income as they may think proper, after providing for all the purposes above named and for all contingent expenses, to appropriate to the furtherance and promotion of the cause of piety and good morals, or in aid of objects and purposes of benevolence or charity, public or private or temperance, or for the education of deserving youths; and give my said trustees, or the survivor of them, and their successors in said trust for the time being, full power, discretion and authority to appropriate and expend said income or capital in such manner as in their judgment may best promote the objects above mentioned."

The bill alleged that the estate had been fully administered, with the exception of said residuary bequest, and that the residue of the estate amounted to more than \$300,000.

The defendants filed a general demurrer.

The attorney general was also, by an amendment, made a defendant, and appeared and agreed that the case might be reserved upon the bill and demurrer, reserving his right to answer after the demurrer should be disposed of.

The case was thereupon reserved by *Gray, J.*, upon the bill and demurrer, for the determination of the whole court.

*B. F. Thomas & W. C. Endicott, (H. W. Paine with them,)* for the defendants. The jurisdiction of the court of chancery in England over charities was not derived from *St. 43 Eliz. c. 4*, but existed before its passage. *Incorporated Society v. Richards*, 1 Dru. & War. 258, and cases there cited. *Attorney General v. Mayor, &c. of Dublin*, 1 Bligh N. R. 347. And that statute does not confine that jurisdiction to the cases of charitable uses therein enumerated. *Tappan v. Deblois*, 45 Maine, 122. The enumeration there made has been practically abandoned. See *Vidal v. Girard*, 2 How. 195, and Binney's argument therein, 151-160; Dwight's Charity Cases, and his argument in the Rose Will case; *Perin v. Carey*, 24 How. 501. There are certain things now recognized as charities which perhaps would not have been, but for the *St. of Eliz.* But the doctrine of charity had an earlier origin. And the enforcement of charitable uses cannot be limited to any narrow or stated formula. It must expand with the advancement of civilization, and the daily increasing needs of men. New discoveries in science, new fields and opportunities for human action, the differing condition, character and wants of communities and nations, change and enlarge the scope of charity, and where new necessities are created new charitable uses must be established. Practically this view has often been sustained by courts of chancery, even while adhering in theory to the strictest construction of the law of charitable uses. [The counsel referred to various cases cited in the opinion, and also to those which follow.] *Loscomb v. Wintlinglam*, 13 Beav. 87. *In re Beloved Wilkes*, 3 Macn. & Gord. 440.

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Saltonstall & others v. Sanders & others.

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*Mills v. Farmer*, 19 Ves. 482. *Attorney General v. Lonsdale*, 1 Sim. 105. *Jones v. Williams*, Ambl. 651. *West v. Knight*, 1 Cas. in Ch. 134. *Nightingale v. Goulburn*, 5 Hare, 484; S. C. 2 Phil. R. 594. *Powerscourt v. Powerscourt*, 1 Molloy, 616. *Attorney General v. Heelis*, 2 Sim. & Stu. 67. *Howse v. Chapman*, 4 Ves. 542. *Faversham v. Ryder*, 5 De G., Macn. & Gord. 350. *Attorney General v. Stepney*, 10 Ves. 22. *Attorney General v. Gladstone*, 13 Sim. 7. *West v. Shuttleworth*, 2 Myl. & K. 684. *Lloyd v. Lloyd*, 2 Sim. (N. S.) 255. *Ashton v. Langdale*, 4 De G. & Sm. 402. *Attorney General v. Wallace*, 7 B. Monr. (Ky.) 611. *Chambers v. St. Louis*, 29 Missouri, 543. *Sweeney v. Sampson*, 5 Indiana, 465. *Cresson's Appeal*, 30 Penn. State R. 437. *Shotwell v. Mott*, 2 Sandf. Ch. 46. *Coggeshall v. Pelton*, 7 Johns. Ch. 292. *Derby v. Derby*, 4 Rhode Island, 414. *Winslow v. Cummings*, 3 Cush. 358.

The English law of charitable uses exists in Massachusetts, and has always been enforced so far as the courts had jurisdiction. And the want of jurisdiction to enforce a charitable bequest does not affect its validity. See *Bartlet v. King*, 12 Mass. 537; Anc. Chart. 52, 93, 94, 222; *King v. Parker*, 9 Cush. 81; Const. of Mass. c. 5, § 2; Sts. 1817, c. 87; 1857, c. 214; Gen. Sts. c. 113, § 2, second and last clauses. From the beginning, it has been the policy of the Commonwealth to cherish and support gifts and devises to benevolence and charity, using those terms in the most liberal sense. See *Drury v. Natick*, 10 Allen, 177-183, and cases cited; *Dexter v. Gardner*, 7 Allen, 243, and cases cited; *Earle v. Wood*, 8 Cush. 445, and cases cited; *Wells v. Heath*, 10 Gray, 17.

The intent of the testator was to devote the residue of his estate to charity. He had in mind four objects: 1. The promotion of piety and good morals; 2. The aid of objects and purposes of benevolence or charity, public or private; 3. Temperance; 4. The education of deserving youth. The 1st, 3d and 4th objects are clearly charitable. The only question as to the 2d arises from the use of the words "benevolence" and "private." These words do not render the bequest void, or show that it was not a gift to charity.

If there are two meanings to a word, one of which will effectuate and the other defeat the testator's object, the court will select the former. *Whicker v. Hume*, 7 H. L. Cas. 154. "Benevolence," in its popular sense and use, is synonymous with charity. These terms are used interchangeably in common speech, in the books, and in the statutes. [The counsel referred to some of the statutes cited in the opinion.] The testator intended to provide for the relief of the poor. He used the word "benevolence" in its popular sense, meaning well doing and not well wishing; just as he used "temperance" in its popular sense, and not as meaning moderation or forbearance. The question to be decided is, what this testator meant by the word "benevolence;" not what the word means etymologically, or as used in any other connection whatever.

The words "public or private," as used in this will, do not defeat the charity. They refer merely to the instrumentality, or the method of administering the charity. The scope and reach of the charity are general, though the hand that administers it is private. Every individual in the community may be the recipient of it.

If the description of the second object can be held to be uncertain, the other three are plain, and there may be a proportional division. *Doyley v. Doyley*, 7 Ves. 58, n. *Longmore v. Brown*, lb. 124. *Salisbury v. Denton*, 3 Kay & Johns. 529. *Mills v. Farmer*, 1 Meriv. 55. *Penny v. Turner*, 2 Phillips R. 493.

*S. Bartlett*, (*G. Wheatland* with him,) for the plaintiffs. There are two principles on which this case turns. 1. The first is one in no way connected with the doctrine of charities, but is one of universal application in equity jurisprudence, namely, that no valid trust can be created which leaves an uncontrollable power of disposition by the trustees, since, to use the language of Sir William Grant, "an uncontrollable power of disposition would be ownership, and not trust." "Every trust (except charitable) must have a definite object. There must be somebody in whose favor the court can decree performance." "If there be a clear trust, but for uncertain objects, the property that is the



subject of the trust is undisposed of; and the benefit of such trust must result to those to whom the law gives the ownership in default of disposition by the former owner." *Morice v. Bishop of Durham*, 9 Ves. 399-405. This precise doctrine is confirmed by Lord Eldon on appeal. 10 Ves. 522. Where it is said that a clear trust for uncertain objects results to the heir at law or next of kin, it merely affirms a common doctrine of equity, that, unless there be something to show that a trust which fails is designed for the benefit of the trustee, it results to those who would take if there had been no such disposition of the property. In *Ommanney v. Butcher*, Turp. & Russ. 260, 272, this same principle is stated with great force, thus: "Liberality and benevolence include charity, but they are not convertible terms. The case therefore not ranking under those which belong to charity, the question came to be considered, whether the purpose was sufficiently definite for the court to execute. The court held that it was not. The fund therefore belonged to next of kin." It may, we think, be confidently stated that no case can be found that impugns this doctrine. See *Fowler v. Garlike*, 1 Russ. & Myl. 232; *Stubbs v. Sargon*, 2 Keen, 255; *S. C.* 3 Myl. & Cr. 507.

2. The second principle is, that whensoever the trustees have an election to apply the whole fund to purposes not technically charitable, (although they may elect, under the terms of the disposition, to apply the same to technical charities,) yet the trust is void, and results to the heir at law or next of kin, because this election places the whole beyond the control of the court, and would thus enable the trustees, as against everybody but the heir at law, to use or misuse the fund at their own discretion. Upon this point it is believed, also, wheresoever an alternative is given to the trustees, the authorities are uniform. The two latest cases would seem to be *Mitford v. Reynolds*, 1 Phillips R. 185-190, where Lord Lyndhurst says, "If these words are to be taken distributively and not conjunctively, and any one of the purposes or of the alternatives would not create a valid charitable bequest, the whole disposition will, of course fail. Upon that point no doubt can be entertained." In *Nas*

v. *Morley*, 5 Beav. 177, 183, Lord Langdale says, "If there be any option in the trustee to apply the funds to purposes which, though liberal or benevolent, are not such as in this court are understood to be charitable, the trusts cannot be executed here."

Under this will, the trustees have an absolute and uncontrollable power to dispose of this fund. The will authorizes them "to hold and invest the same, and the income thereof, in such manner as may seem to them expedient;" and to appropriate to the objects which are named "so much or the whole of the principal or of the income as they may think proper;" and it gives to them, or the survivor of them, and their successors, "full power, discretion and authority to appropriate and expend said income or capital in such manner as in their judgment may best promote" those objects.

If treated as a mere trust, this bequest would be void, as within the doctrine against perpetuities, since the testator contemplated that it might endure beyond the life of the last survivor of the trustees, and be executed by remote successors. But since some of the purposes of the trust to which, by the election of the trustees, the fund may be devoted are charitable, the question is whether, by reason of this feature, the trust can be supported; and if not, then whether, within settled rules, it is too indefinite to be executed, and so the fund results to the heirs at law.

The doctrine is thus stated in *Tudor on Charitable Trusts*, 223: "Where however a bequest is made for charitable purposes, and also for purposes of an indefinite character which are not charitable, the whole bequest will be void. If, for instance, a bequest is made for such charitable or other purposes as the trustees should think fit, the whole bequest will be void for uncertainty." See also *Vezey v. Jamson*, 1 Sim. & Stu. 69; *Williams v. Kershaw*, 5 Law Journ. (N. S.) (Ch.) 84; *Ellis v. Selby*, 1 Myl. & Cr. 286; *Kendall v. Granger*, 5 Beav. 300; *Thompson v. Thompson*, 1 Colly. R. 398. The principle of all these cases is, that the portion of the trust that might otherwise be construed as charitable cannot be sustained, because the trustees have an election to apply the fund to purposes not technically charitable

and as to the gifts to purposes not charitable, they are held void because too vague and indefinite to be administered by a court of equity. And in all of these cases, the trust is declared a resulting one for the next of kin. See also cases collected in Hill on Trustees, 116.

The only cases that seem to militate with the above, and numerous others which might be cited, are *Waldo v. Cayley*, 16 Ves. 206, and *Horde v. Earl of Suffolk*, 2 Myl. & K. 59. But Lord Cottenham declares, in *Ellis v. Selby*, that the former was decided before it was settled that a private charity could not be carried into effect in a court of chancery, and that in the latter Sir John Leach omitted to notice the point; and also in *Williams v. Kershaw*, that as Sir John Leach took no notice of the objection he could not be considered to have overruled the point.

The above doctrines are applicable to the words of this will. The trustees are authorized to apply the whole fund to either of the objects named. One of these objects is "private benevolence;" and private benevolence is not a charity. *Morice v. Bishop of Durham*, and *Ommanney v. Butcher*, above cited. *James v. Allen*, 3 Meriv. 17.

It is said by the counsel for the defendants that it is not necessary to resort to the *St. of Eliz.* to determine what is a charity; and, from the fact that jurisdiction in equity was exercised over charities prior to that statute, it is inferred that the charities come from elsewhere. But that fact settles nothing. The *St. of Eliz.* was passed on account of the excesses which had prevailed; and it professes to be in restraint, and to define. Tudor on Charitable Trusts, 2. *Wright v. Methodist Episcopal Soc.*, Hoffman Ch. 262, 264. That statute, therefore, determines what are public charities. The provision in our constitution, which has been referred to, enjoining magistrates to countenance principles of general benevolence, was not designed to encourage a violation of the common law as to perpetuities. And every one of the large array of cases cited for the defendants will be found to fall within three settled heads of charity jurisdiction, namely the poor; pious uses; or the advancement of general learning

or public uses. Some of the cases have public and private charities coupled together; and in such cases another question arises, what disposition will be made of the fund. See *Williams v. Kershaw*, above cited. *Brown v. Kelsey*, 2 Cush. 243. Boyle on Charities, 283. In the present case the objects of the trust are not coupled together, but are presented in the alternative. And in such a case there is no decision that there can be an apportionment.

GRAY, J.\* The general principles upon which the parties respectively rely are not controverted. It is not doubted that a bequest in trust for such charitable uses as the trustees may think fit is valid, although declared to be perpetual. On the other hand, it is admitted that a trust, which may by its terms endure forever, for undefined purposes, not charitable in the view of a court of chancery, is void, and results to the heirs of the donor; and that a bequest to trustees, to apply the income in their discretion to charitable purposes or other purposes not charitable, is void, at least in part.

The question to be determined is whether the residuary bequest in the will of Charles Sanders is limited to charitable purposes. After providing for the payment of his debts and funeral expenses, and various legacies and bequests, including one to the town of Gloucester, the place of his ancestors, and one to the city of Cambridge, the place of his residence, of ten thousand dollars each, to be held as a permanent fund, and the interest paid quarterly, "as long as the vice of drunkenness there exists," "to some worthy man in each place, who has discretion and zeal for the cause, to be constantly employed as a missionary in the cause of temperance, in reforming old drunkards and preventing young drunkards, and abolishing, as far as possible, the use of all intoxicating articles," the testator gives the residue of his estate to his executors and the survivor of them, their and his executors, administrators and assigns, "as trustees, in trust to hold and invest the same and the income thereof, in such manner as may seem to them expedient; and so much or the

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\* This case was argued at the end of this term before all the judges but COLT, J

whole of the principal or of the income as they may think proper, after providing for all the purposes above named and for all contingent expenses, to appropriate,"

First, "to the furtherance and promotion of the cause of piety and good morals, or"

Secondly, "in aid of objects and purposes of benevolence or charity, public or private, or"

Thirdly, "temperance," (which is shown by the previous clause, above quoted, to have been used by the testator in its modern and limited sense of restraining the abuse of intoxicating liquors,) "or"

Fourthly, "for the education of deserving youths."

He then adds, "And I give my said trustees, or the survivor of them, and their successors in said trust for the time being, full power, discretion and authority to appropriate and expend said income or capital in such manner as in their judgment may best promote the objects above mentioned."

The learned counsel for the plaintiffs admit the advancement of religion and morality, the prevention of vice, and the education of youth, as contemplated in the first, third and fourth of these classes of objects, to be charitable uses; and seek to maintain their bill only upon the ground that the words describing the second class are so vague as to permit the trustees to expend the fund for purposes of an undefined character which are not charitable, and that the whole residuary bequest is therefore void. The specific objections made are two; that the trustees may apply the property to private charity; or to benevolent purposes which are not charitable at all.

But after deliberate advisement, and careful examination of the authorities cited, the court is unanimously of opinion that neither of the objections is well taken, and that the aim of the clause in question is the general relief of the poor, which all admit to be a charitable use. We have therefore no occasion in this case to consider the source and extent of the principles and jurisdiction of chancery in the matter of charities before the *St.* of 43 Eliz.

This bequest is to receive such an interpretation, if possible,

as will carry out the intention of the testator. A charitable gift, above all others, is to be so construed *ut res magis valeat quam pereat*. As Lord Chancellor Chelmsford said, in the most recent case in the house of lords upon the construction of general charitable bequests, "If there are two meanings of a word, one of which will effectuate and the other will defeat the testator's object, the court is bound to select that meaning of the word which will carry out the intention and objects of the testator." *Whicker v. Hume*, 7 H. L. Cas. 154. And it is not for this court to forget that the Constitution of Massachusetts declares (in words which may be supposed to have been in the mind of this testator when he framed his will) that "it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to countenance and inculcate the principles of humanity and general benevolence, public and private charity." Constitution of Massachusetts, c. 5, § 2.

To say that a trust cannot be administered by a court of chancery, and therefore is not a charity, is to reason backwards, or in a circle. The jurisdiction of a particular court is not the test of what is a charity; but any trust which is charitable, although too indefinite in its terms to be sustained if it were a private trust, may be controlled and administered by a court of full equity jurisdiction. Even the want of any court vested with jurisdiction to enforce it does not affect the validity of a charitable trust. *Bartlet v. King*, 12 Mass. 544, 545. *King v. Parker*, 9 Cush. 81. *Vidal v. Girard*, 2 How. 196.

The assistance of the poor is required not only by the moral and religious duty of every citizen, but by a sound public policy and a regard for the interests of the whole community. A gift "to the poor" generally, or to the poor of a particular town, parish, age, sex or condition, is a good charitable gift. It is the number and indefiniteness of the objects, and not the mode of relieving them, which is the essential element of a charity. It makes little difference to the contributors, the poor, or the public, and none in the nature of the charity, what is the mode of distributing relief. In the eye of the law, as of Christianity, almsgiving in secret is not less meritorious or charitable

than the more open assistance of the poor in almshouses and hospitals. In every act of relieving the poor, by whatever means, the immediate benefit is to the individual. Hunger, nakedness, disease, are personal, and the relief is also personal and in one sense private. A good charitable use is "public," not in the sense that it must be executed openly and in public; but in the sense of being so general and indefinite in its objects as to be deemed of common and public benefit. Each individual immediately benefited may be private, and the charity may be distributed in private and by a private hand. It is public and general in its scope and purpose, and becomes definite and private only after the individual objects have been selected.

The *St.* of 43 Eliz. c. 4, to which we are accustomed to recur for the most familiar examples of charitable uses, enumerates many which consist in the first instance, if not chiefly, in the benefit conferred on individuals. Such certainly are "relief of aged, impotent and poor people," "maintenance of sick and maimed soldiers and mariners," "education and preferment of orphans," "marriages of poor maids," "supportation, aid and help of young tradesmen, handicraftsmen and persons decayed," and "relief or redemption of prisoners and captives."

The law upon this matter appears very clearly in the judgments of Lord Hardwicke, which are of the highest authority, both from his unsurpassed mastery of the principles of equity jurisprudence, and as having been delivered before the separation of the United States from the crown of Great Britain.

The earliest case reported is one in which a testator, after fixed pecuniary legacies to a certain number of ministers and clergymen, poor decayed families, poor widows, maidens and boys, to be performed at the discretion of his executors, the qualifications of the persons to be relieved being duly weighed and considered; and bequests to persons and charitable institutions, to be paid as his executors should judge best; gave the surplus "to be distributed to widows or poor orphans of nonconformist ministers, not being at the time worth upwards of £100 a year, and widows being upward of fifty years of age," "to be paid in such proportions and to such numbers only, be the same more or less

as his executors should judge meet." Lord Hardwicke, in the exercise of his jurisdiction over public charities, sustained an information by the attorney general to ascertain and direct the mode of distribution by the executors. *Attorney General v. Glegg*, Ambl. (2d ed.) 584, 585, note; S. C. 1 Atk. 356; S. C. nom. *Attorney General v. Speed*, West Ch. 491.

The next case more conclusively shows that a gift to poor individuals of a particular class, though to be distributed by a private hand, is still a charity and a public charity. Mrs. Squire by her will gave legacies to her servants and other persons; to certain charity schools and hospitals; "to poor housekeepers, to be distributed to such of them and in such a manner as Mrs. Northcote and Mrs. Green should appoint;" "to the Parish of South Morlton;" and "to the Parish of Sunnyhill, to be distributed amongst those that were at that time lame or visited with sickness;" and made Mrs. Northcote her executrix. After Mrs. Squire's death, Mrs. Northcote made a will by which she gave "to all the public charities to which dear Mrs. Squire has given any legacies by her will £100 a piece." Mrs. Northcote's residuary legatees insisted that Mrs. Squire's legacies to be distributed to such poor housekeepers as Mrs. Green and Mrs. Northcote should appoint, and to the sick and lame of Sunnyhill, were private charities, and therefore not, like those to charity schools and hospitals, to be increased by Mrs. Northcote's bequest to "all the public charities" named by Mrs. Squire. But Lord Hardwicke held both of them to be public charities, saying, "The charter of the crown cannot make a charity more or less public, but only more permanent than it would otherwise be; but it is the extensiveness which will constitute it a public one. A devise to the poor of a parish is a public charity. Where testators have not any particular person in their contemplation, but leave it to the discretion of a trustee to choose out the objects, though such person is private, and each particular object may be said to be private, yet in the extensiveness of the benefit accruing from them they may very properly be called public charities. A sum to be disposed of by A. B. and his executors, at their discretion, among poor



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housekeepers, is of this kind." *Attorney General v. Peirce Barnard*. Ch. 208; S. C. 2 Atk. 87.

In another case, in which a testator, in case of his son's dying under age, gave to his executors his real estate "for such charitable uses and purposes as I shall direct by codicil or otherwise," and his personal estate to "be disposed of among widows and orphans of dissenters and to my poor relations, in such proportion as they shall think fit;" and by a codicil, expressed to be made pursuant to the first clause in the will, directed the real estate to be sold or held by the trustees, and the purchase money or income applied or distributed among such persons or to and for such uses and purposes and in such manner as the testator should in writing appoint, and, for want of such appointment, as the trustees should judge fit and convenient; Lord Hardwicke held that, taking the will and codicil together, there was no resulting trust for the heir, but a good disposition to charitable uses; and said, "The expression in the codicil 'upon such persons and to and for such uses' are common words in devises to charity." *Cook v. Duckenfield*, 2 Atk. 562, 567. Again; where a testator gave out of certain property specific sums, amounting to its then income, to various charities, including thirty shillings yearly on certain days to be disposed of in bread among the poor of the parish, and £5 10s. more to "be yearly disposed of forever in relieving the distressed and poor about Guerendue in meat and drink and clothing, at the discretion of his executor forever," Lord Hardwicke held that the whole income of the estate was well given to charitable uses. *Attorney General v. Johnson*, Ambl. (2d ed.) 190, & note. He also established as public charities trusts of unlimited duration to be applied for the benefit of poor relations of the testator at the discretion of his executor, than which it would be hard to imagine anything more private in the class of individuals benefited or in the mode of distribution. *Attorney General v. Bucknall*, 2 Atk. 328. *Isaac v. De Friez*, 17 Ves. 373, note; S. C. Ambl. 595.

The law seems to have been understood in the same way by the highest legal authorities in the Province of Massachusetts before the American Revolution. In 1760 John Alford made a

will by which he gave the residue of his estate, real and personal, "to charitable uses, private or more public, such as may be thought most agreeable to the mind and will of God, the Giver of them all, as recorded to us in his holy word, and the good of those who shall be thought the most suitable objects for it; the houses and lands unimproved, as well as those under improvement, to be sold as advantageously as may be, and the money collected and put under the best improvement by my executors hereafter mentioned, for those uses and services; they asking the advice of some reverend and good gentlemen as occasion may need and require." In 1761 this will was presented for probate by Edmund Trowbridge and Richard Cary, the executors named therein, and allowed by the probate court of Middlesex, from whose decree the widow and heirs appealed to the governor and council as the supreme court of probate, alleging as reasons of appeal that the testator was not of sound and disposing mind, and that "the said paper in many parts thereof is manifestly unintelligible, and no intention or will can be collected by any rules of law from the words of it," which last has been since held by this court to be no ground for refusing probate of a will. *Hawes v. Humphrey*, 9 Pick. 350, 362. After argument in the supreme court of probate by James Otis and Oxenbridge Thacher for the appellants, and Jeremy Gridley and Robert Auchmuty for the appellees, the parties referred the points in dispute to Thomas Hutchinson, (then lieutenant governor and chief justice of the province,) two other members of the governor's council, and Gridley and Otis, the leading counsel of both parties, for their advice. The first point thus referred was whether the executors could compound with the widow and heirs on such terms as might appear to the executors to be just and reasonable, if materially variant from the will. Upon which the referees said, "That inasmuch as exception hath been taken to the sanity of the said Colonel Alford at the time of executing his pretended will and for divers years before, and also to the legality of the residuary devise, admitting him to have been of sound mind, and it being very uncertain how far those exceptions may finally prevail, and there being no particular person or body corporate who by virtue of the said will

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can lay claim to the said residuary devise or any part thereof we are therefore of opinion that you may safely and equitably compound with the widow and heirs, although such composition should be a departure from the said will." This advice was agreeable to the practice of courts of chancery, which sometimes allow a compromise of a contested charity case, requiring however the consent of the attorney general as being the proper officer to see to the execution of charities in such courts. *Tudor on Charitable Trusts*, (2d ed.) 153. The second point concerned the mode of carrying out the composition, by affirming, in the supreme court of probate, the decree of the court below. The third point related to the proportions to be allowed to the widow and heirs, and retained by the executors, which the referees, upon a consideration of the provisions of the will and the circumstances of the case, fixed at six tenths and four tenths respectively. The remaining question was, "To what particular use or uses may that residue be best applied, consistent with the will of the donor?" To which the referees answered, "We advise you to consult with some reverend good gentlemen, and then apply the four tenths aforesaid to such pious and charitable use as you in your discretion shall think most fit and proper." The parties then executed an indenture, reciting and carrying out the advice of the referees, which the supreme court of probate ordered to be recorded in their registry, gave liberty to the appellants to withdraw their appeal, and affirmed the decree of the probate court. *Winslow v. Trowbridge*, Supr. Prob. Rec. 1762-63, fol. 28-40. As there was then no court of chancery here, there could hardly be better evidence of the law of the province than this deliberate advice of the chief justice and the two greatest lawyers in Massachusetts at that time.

In *Washburn v. Sewall*, 9 Met. 280, this court held that a gift to an unincorporated voluntary association of women, having for its objects the providing of groceries for the sick and infirm, and clothing and fuel for the helpless and needy was a good charitable gift. See also *King v. Parker*, 9 Cush. 82. And Chancellor Kent, adopting as his guide Lord Hardwicke's judgment in *Attorney General v. Peirce*, above cited, says, "It is the

extensiveness of the object that constitutes it a public charity. A charity may be public, though administered by a private corporation. A devise to the poor of a parish is a public charity." 2 Kent Com. (6th ed.) 276.

The English decisions of the greatest weight since our Revolution maintain the same principles.

Lord Eldon established and carried out a bequest of £30,000 to trustees, to be invested forever, and the income paid "unto and amongst such number of the poor inhabitants of" certain parishes, "at such times and in such proportions, and either in money, provisions, physic or clothes, as his said trustees or the major part of them for the time being shall from time to time think fit, for the better support and maintenance of such poor inhabitants." *Bishop of Hereford v. Adams*, 7 Ves. 324. He also held that the general residue of an estate was given to charitable purposes by the following words: "All the remainders of my different bequests I give and bequeath to the Archbishop of Canterbury and to the Archbishop of York for the time being, in trust for charitable purposes, and anything not specified I commit to the discretion of my executors. I desire my executors to make some donation out of my property to the poor of the different places where I have estates." *Paice v. Archbishop of Canterbury*, 14 Ves. 364.

Sir William Grant sustained as charitable a residuary bequest "to the widows and orphans of seamen belonging to the town of Liverpool;" and ordered it to be paid to the rectors of Liverpool and their successors, to be by them invested, and the interest paid and distributed unto and amongst such poor sailors' widows and orphans, inhabitants of Liverpool, as should in their judgment be deserving objects of charity. *Powell v. Attorney General*, 3 Meriv. 48. He also followed Lord Hardwicke's decisions as to permanent trusts for the assistance of poor relations, saying of such a bequest in one case, "It is to have perpetual continuance in favor of a particular description of poor, and is not like an immediate bequest of a sum to be distributed among poor relations." *Attorney General v. Price*, 17 Ves. 371. *White v. White*, Boyle & Charities, 34, 35; *S. C.* 7 Ves. 423.

More exactly in point is the case in which these two eminent judges sustained as a valid charity a bequest of income to be expended "in promoting charitable purposes, as well those of a public as of a private nature, and more especially in relieving such distressed persons, either the widows or children of poor clergymen, or otherwise, as my said wife shall judge most worthy and deserving objects; giving a preference always to poor relations." *Waldo v. Caley*, 16 Ves. 206. In another case, Lord Eldon, affirming a decision of Vice Chancellor Leach, held a bequest "If there is money left unemployed, I desire it may be given in charity," to be a valid gift of the residue of the personal estate. *Legge v. Asgill*, Turn. & Russ. 265, *note*.

Sir John Leach also held a bequest to trustees "for the benefit of such public or private charities as they in their discretion might think fit" to be a valid charitable donation. *Johnston v. Swann*, 3 Madd. R. 457. And after he had become master of the rolls, he sustained a bequest of an annuity to "the testator's wife," "to be by her distributed in charity according to her own discretion and judgment, either to private individuals or public institutions, in such sum or sums, way and manner as she shall from time to time choose, without limitation or control from any person whomsoever;" and a residuary bequest to trustees, to be continued at interest, and the dividends "given away in charity either to individual persons or to public institutions," with like unlimited discretion. *Horde v. Earl of Suffolk*, 2 Myl. & K. 59.

The decision which goes farthest to support the position of the plaintiffs as to the meaning of the words "private charity" is that in *Ommanney v. Butcher*, Turn. & Russ. 260. There a testator, after legacies to certain individuals, and to various schools, hospitals, and other religious and charitable institutions of which he was a governor or trustee, added, "In case there is any money remaining, I should wish it to be given in private charity." Sir Thomas Plumer, M. R., held this last bequest too indefinite to be carried out, either by the sign manual of the crown, or by the ordinary jurisdiction in chancery. The opinion does not show that degree of thought and research which

characterizes most of the judgments of that learned person. His statement that there was no case in which private charity had been acted upon by the court is inconsistent with the long line of authorities above quoted, not one of which is noticed in the opinion, except *Legge v. Asgill*; and no attempt is made to distinguish that case, although the direction there that any money left unemployed might "be given in charity," as Mr. Boyle remarks in his able and discriminating treatise, "surely must be regarded as pointing quite as much, if not more, to private than to public charity." Boyle on Charities, 300. Sir Thomas Plumer's expression, that "the charities recognized by this court are public in their nature, they are such as the court can see to the execution of," suggests the inference that he thought it necessary to have the funds distributed openly in the public view, or the court could not supervise the distribution. This inference is confirmed by his adding, "Assisting individuals in distress is private charity; but how can such a charity be executed by the court?" To which it may be answered, "By requiring an account, as of any other trustee who is charged with neglect or breach of trust." And the cases already cited show that Lord Hardwicke, Lord Eldon, Sir William Grant and Sir John Leach upheld and executed charities for privately assisting indefinite numbers of individuals in distress. Sir Thomas Plumer says, "In all cases the general principle is, that the trust must be of such a tangible nature as that the court can deal with it; when it is mixed up with general moral duty, it is not the subject of the jurisdiction of a court of justice." But general moral duty, carried out in acts beneficial to an indefinite number or class of persons, is of the very essence of a charity; and in the cases in which trusts have been set aside as too vague, it has been upon the ground that they might be applied to the benefit of particular individuals, to benefit whom was of no general or public advantage. If, as he says, "private charity is in its nature indefinite," it has the principal requisite of a public charity. This judgment of Sir Thomas Plumer, although countenanced by *obiter dicta* of Lord Cottenham near the beginning of his career as chancellor, in *Williams v. Kershaw*,

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5 Law Journ. (N. S.) (Ch.) 86, and *Ellis v. Selby*, 1 Myl. & Cr. 293, cannot, in a court not bound by it as a precedent, outweigh all the other authorities.

There is a species of organization, sometimes called a "private charity," which is not a public or general charity in the view of the St. of Eliz. or of a court of chancery; and that is an association for the mutual benefit of the contributors and of no other persons. But such a case wants the essential element of indefiniteness in the immediate objects, if not that of gratuity in the contribution. *Anon.* 3 Atk. 277. *Attorney General v. Haberdashers' Co.* 1 Myl. & K. 420. *Carne v. Long*, 2 De Gex, Fisher & Jones, 75. *Attorney General v. Federal Street Meeting-house*, 3 Gray, 44-52. Upon no reasonable construction can a bequest to "private charity," still less one to "charity, public or private," be brought within that class.

The decisions of Lord Langdale, to which the plaintiffs have referred, were as follows: In one of them he held a bequest to executors to receive the interest half-yearly "and divide it among poor pious persons, male or female, old or infirm, as they see fit, not omitting large and sick families, if of good character," to be a valid charitable bequest for the poor. *Nash v. Morley*, 5 Beav. 177. In the other, of a bequest to trustees, to be applied at their discretion "for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility," Lord Langdale said that if the sentence had ended with the word "individuals," it would have been a good charitable purpose; but he felt himself bound by the decisions to hold that the words "general utility" (which do not occur in the will before us) were large enough to include purposes which were not charitable, and that the whole bequest was therefore void. *Kendall v. Granger*, 5 Beav. 300.

In *Ellis v. Selby*, 7 Sim. 352; *S. C.* 1 Myl. & Cr. 286, the only point decided was that a bequest in trust for "charitable or other purposes" as the trustee should think fit, was void. The correctness of that decision cannot be doubted; for the testator could hardly have expressed more clearly an intention to allow the fund to be applied to purposes which were not charitable, as

well as to those which were. The decision of Sir John Leach in *Vezey v. Jamson*, 1 Sim. & Stu. 69, against the validity of a gift in trust for "such charitable or public purposes as the laws of the land would admit of, or to any person or persons," and in such shares and manner as the trustees should think fit or as the laws admitted of, is to the same effect; and manifests no intention to overrule or qualify the cases in which he had upheld trusts for "public or private charities" or "to be distributed in charity to private individuals or public institutions," or for "charitable and benevolent purposes." *Johnston v. Swann*, and *Horde v. Earl of Suffolk*, *supra*. *Jemmit v. Verril*, *infra*. The passages quoted from Lord Lyndhurst's opinion in *Mitford v. Reynolds*, 1 Phillips R. 190, and from Tudor on Charitable Trusts, (2d ed.) 223, go no farther. Within the same class falls the decision of Vice Chancellor Knight Bruce, that a direction that part of the testator's property should "be given in occasional sums to deserving literary men, or to meet expenses connected with my manuscript works," part of the profits of which works he gave to members of his family, was void. *Thompson v. Thompson*, 1 Colly. R. 388, 392, 399. Others of the cases cited for the plaintiffs related to bequests in trust to be disposed of in the trustees' discretion, without any mention whatever of charities in the will. Such were *Fowler v. Garlike*, 1 Russ. & Myl. 232; and *Stubbs v. Sargon*, 2 Keen, 255; S. C. 3 Myl. & Cr. 507.

We are therefore of opinion that, upon principle and authority, a bequest for "objects and purposes of charity, public or private," is a valid charitable gift. The effect of the use of the word "benevolence" in connection with the word "charity" remains to be considered.

The earliest case cited for the plaintiffs upon this point is that in which Sir William Grant, and Lord Eldon on appeal, held that a bequest to the Bishop of Durham in trust to be applied "to such objects of benevolence and liberality as the Bishop of Durham in his own discretion should most approve of," was too indefinite to be executed. *Morice v. Bishop of Durham*, 9 Ves. 399; S. C. 10 Ves. 521. But "liberality" might include gifts



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to persons who were neither poor nor deserving, and in no sense, legal or moral, objects of charity. The word "charity" was not used; and its absence was much relied on, Sir William Grant saying, "The use of the word 'charitable' seems to have been purposely avoided in this will, in order to leave the bishop the most unrestrained discretion." 9 Ves. 404, 405; 10 Ves. 541. Sir William Grant afterwards held that a bequest to trustees "to be by them applied and disposed of for and to such benevolent purposes as they in their integrity and discretion may unanimously agree on," fell within the same class. *James v. Allen*, 3 Meriv. 17. But in that case again the word "charity" was not used. Lord Brougham subsequently defined the distinction upon which those cases turned, thus: "If the intention be charity, the court will execute it, however vaguely the donor may have indicated his purpose. But mere purposes of a kind generally beneficial, as of those of benevolence or liberality, without specifying the objects who are to receive, and those objects not being the poor, the court will never attempt to execute." *Attorney General v. Haberdashers' Co.* 1 Myl. & K. 428

Vice Chancellor Leach used "general benevolence" as equivalent to charity. He held a bequest "to the widows and orphans of the Parish of Lindfield" to be a charitable gift for the poor widows and orphans of that parish, because it "could not in its nature have proceeded from motives of personal bounty to particular individuals; it must have proceeded from general benevolence towards two classes of persons who were suffering under a common circumstance of destitution or privation, and is necessarily to be confined to such of those two classes who are within the scope of general benevolence." *Attorney General v. Comber*, 2 Sim. & Stu. 93. And he upheld a bequest to trustees, to be applied and disposed of "for such charitable and benevolent purposes" as one of them should direct and think proper. *Jemmit v. Verrii*, Ambl. 585, *note*.

By far the strongest case in favor of the plaintiffs is that of *Williams v. Kershaw*, which is not to be found in any of the regular reports, but is reported by Mr. Beavan in 5 Law Journ. (N. S.) (Ch.) 84, and an abstract of it printed in 5 Clark & Fin. 111

In that case a testator, after legacies for education, the poor, missionary societies and dissenting ministers, gave the residue of his personal estate to trustees to apply the income "to and for such benevolent, charitable and religious purposes as they in their discretion shall think most advantageous and beneficial." Sir Christopher C. Pepys, M. R., considered himself bound by the cases of *Morice v. Bishop of Durham*, *James v. Allen*, and *Ommanney v. Butcher*, to hold that this would authorize the application of the income to benevolent purposes which were neither charitable nor religious, and was therefore void; and two months afterwards, having meanwhile become Lord Chancellor Cottenham, he referred to the decision with approval. *Ellis v. Selby*, 1 Myl. & Cr. 298.

But that decision is directly opposed to the construction given to like words in earlier and later judgments of the house of lords upon appeal from the courts of Scotland. In *Hill v. Burns*, 2 Wils. & Shaw, 80, a bequest was held valid, by which a testatrix appointed the residue of her estate "to be applied by my said trustees in aid of the institutions for charitable and benevolent purposes, established or to be established in the city of Glasgow or neighborhood thereof; and that in such way and manner, and in such proportions of the principal or capital, or of the interest or annual proceeds of the sums so to be appropriated, as to my said trustees shall seem proper; declaring, as I hereby expressly provide and declare, that they shall be the judges of the appropriation of the said residue for the purposes aforesaid." That case was cited as authority by Lord Lyndhurst in *Crichton v. Grierson*, 3 Bligh N. R. 434; *S. C.* 3 Wils. & Shaw, 341. In a later case, in which *Williams v. Kershaw* was cited, the house of lords established a residuary bequest to trustees to be applied "to such benevolent and charitable purposes as they think proper," recommending them, if it should amount to £600, to hold the principal, and pay out the income annually 'to faithful domestic servants, settled in Glasgow or the neighborhood, who can produce testimonials of good character and morals from their masters and mistresses after ten years' service;' but if less than that amount,

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the testator authorized his trustees "to distribute the same to such charitable or benevolent purposes as they may think proper." *Miller v. Rowan*, 5 Clark & Fin. 99; *S. C.* 2 Shaw & Macl. 866.

It was indeed said in the two cases last cited that the law of England as to charitable bequests was more strict than the law of Scotland. But the decisions of the English courts since our Revolution are of no binding authority in this court; and, upon such a question as the interpretation of the word "benevolence," as connected with "charity," of no peculiar weight, when opposed to the well settled meaning of those words in our own law.

The word "benevolent," without the addition of any synonymous or explanatory words, has been often, if not uniformly used in the statutes of the Commonwealth, as equivalent to "charitable." The *St.* of 1790, c. 19, incorporating and establishing the Humane Society of the Commonwealth of Massachusetts, had this preamble: "Whereas it is the duty of government at all times to countenance and support its citizens in their exertions for alleviating the distresses of their fellow-men: And whereas divers persons have petitioned this court for an act of incorporation, whereby they may more effectually carry into execution their benevolent designs." "The end and design of the institution of the said society," as declared in the fifth section of that act, "is for the recovery of persons who meet with such accidents as produce in them the appearance of death, and for promoting the cause of humanity, by pursuing such means from time to time as shall have for their object the preservation of human life, and the alleviation of its miseries." 1 Special Laws, 288, 289. The *St.* of 1818, c. 77, incorporating the Newburyport Howard Benevolent Society, provided that "the funds of said society shall always be improved and appropriated to the humane purposes of relieving the distresses of the poor, the sick and the aged." The *St.* of 1833, c. 123, incorporated the United States Naval Benevolent Association, "for the purpose of affording relief to the widows, orphans, parents or maiden sisters of the members of said association, and such other persons as said

association may from time to time deem entitled to its assistance." The *St.* of 1852, c. 161, established a corporation by the name of the Georgetown Women's Benevolent Society, "for the purpose of aiding and promoting benevolent enterprises." See also *Sts.* 1817, c. 124 ; 1854, c. 223 ; 1857, c. 154.

From the early part of this century, at least, the word "benevolence," as coupled with "charity," has been constantly used in the legislation of Massachusetts to signify purposes strictly charitable, and especially the relief of the poor. By *St.* 1802, c. 69, the Portland Benevolent Society were incorporated to relieve and assist the poor, "and generally to exercise such acts of charity, hospitality and benevolence, as the funds of the society shall allow." 3 Special Laws, 85. By *St.* 1808, c. 58, the Beverly Charitable Society were incorporated for the purpose of raising a fund in order to relieve and assist the poor inhabitants of Beverly, widows and orphans, "and generally to perform such acts of charity and benevolence, as the funds of the society may allow ;" and were authorized to take and hold property, "to be used and improved for the purposes aforesaid, or such other benevolent purposes as the donor may particularly direct." By *St.* 1816, c. 22, incorporating the Franklin Charitable Society, "the funds of the said society shall be always improved and appropriated to benevolent and humane purposes." By *St.* 1819, c. 52, incorporating the Trustees of the Ancient Landmark Charity Fund, they were to employ the income of their estate "in acts of charity and benevolence, and not otherwise." By *St.* 1819, c. 102, incorporating the Trustees of Saint Peter's Charity Fund in Newburyport, they were vested with the powers and privileges, and made subject to the duties and liabilities, "incident to other charitable institutions ;" and might employ their income "in acts of charity and benevolence, and for no other use whatever ;" and make rules and by-laws "for the better management and administering the said charity." By *St.* 1831, c. 18, the Massachusetts Charitable Fire Society were authorized to appropriate part of their funds "to any other charitable purpose or purposes than those mentioned in their act of incorporation, and to such benevolent institutions within this

Commonwealth," as the society might designate. By St. 1832 c. 67, the Marblehead Charitable Society were incorporated, "for the purpose of raising a fund in order to assist and relieve each other when in circumstances of want and distress, to aid their destitute widows, to provide for their helpless orphans, and to perform such acts of charity and benevolence as the funds of the society may allow." By St. 1838, c. 142, incorporating the Truro Benevolent Society, their property was "to be devoted exclusively to charitable purposes;" and by St. 1840, c. 56, the Wellfleet Marine Benevolent Society were incorporated, and authorized to hold property "for charitable purposes." By St. 1843, c. 35, the Lowell Irish Benevolent Society, and by St. 1845, c. 168, the Marblehead Female Humane Society, were incorporated "for charitable and benevolent purposes;" and similar language is used in the charters of many other "benevolent" or "charitable" societies. Sts. 1854, c. 404; 1856, cc. 140, 212, 221, 281, 303.

The general tax law of the Commonwealth, in enumerating the classes of property exempted from taxation, inserts, between the property of the United States and of the Commonwealth, and the property of common school districts the income of which is appropriated to the purposes of education, "the personal property of literary, benevolent, charitable and scientific institutions incorporated within this Commonwealth; and the real estate belonging to such institutions, occupied by them or their officers for the purposes for which they were incorporated." Gen. Sts. c. 11, § 5, cl. 3. This clause in its present shape was inserted by the legislature thirty years ago in the Rev. Sts. c. 7, § 5, cl. 2.

Whatever therefore may be the meaning, in the law of Massachusetts, of the word "benevolence" by itself, there can be no doubt that when used in connection with "charity," as in this will, it is synonymous with it; and the connecting "or" must be taken in the sense of defining and limiting the nature of the charity intended, and of explaining one word by the other. *Copulatio verborum indicat quod accipiantur in eodem sensu.*

In the present case, this construction is fortified by the collocation of the clause in question. The other classes of uses, preceding and following this, are admitted to be charitable in the legal sense which of itself creates a presumption that the purposes of this clause are of the same description. But the fact that in those other clauses are specified religious, moral and educational purposes, which are the principal kinds of charities other than relief of the poor, strongly tends to show that "charity" is not here to be interpreted in its largest technical sense, but that the words "benevolence or charity" were used by the testator in their limited and ordinary popular acceptation. This inference is aided by his use of the word "temperance" in a like sense. And the additional words "public or private" must be taken in their natural meaning, and according to the construction given to them by the courts in a great majority of similar cases, to indicate the mode of distribution only. The manifest intent of the clause is the general relief of the poor, either through public institutions, or through almsgiving by the agency of individuals. The gift, being for a lawful charity, is sufficiently defined to be upheld and enforced by the court.

The testator, in authorizing the trustees to expend at their discretion, for the charitable purposes specified, any part or the whole of either the capital or the income of the trust fund, evidently expected the income at least to be ordinarily paid to such purposes, and cannot be supposed to have contemplated an indefinite accumulation. The possibility of accumulation of the income does not defeat or impair the charitable gift. *Odell v. Odell*, 10 Allen, 1, and cases cited.

If at any time hereafter doubts should arise as to the mode of distribution, or the trustees should exercise their discretion illegally or unreasonably, this court, upon bill or information, may control and regulate the administration of the charity.

*Demurrer sustained; bill dismissed.*

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Randall, petitioner for *certiorari*.

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SAMUEL H. RANDALL, Petitioner for *certiorari*.

The doings of the superior court removing an attorney from practice cannot be revised or corrected, after judgment, by this court on a writ of *certiorari*.

PETITION for a writ of *certiorari*, to quash the proceedings of the superior court in removing the petitioner from practice as an attorney at law. The petitioner set forth that no complaint or process in any form was filed against him, by reason of which omission the proceedings were illegal, and he accordingly at all times objected against them in the manner in which they appeared and were conducted before the court; and, for want of a legal record, he was deprived of his right to establish in this court his exceptions which were disallowed in that court. Notice of the pendency of the petition was served on the district attorney for the county of Suffolk, who appeared and answered orally, and the case was reserved by *Chapman, J.* for the determination of the whole court. This case was argued in March 1865.

*S. H. Randall, pro se.*

*H. F. French*, assistant district attorney, *contra*.

BIGELOW, C. J. We have not paused to consider the subject matter of the petitioner's complaint, because we are clearly of opinion that, if he has any cause of grievance arising out of the proceedings of the superior court, his remedy therefor is not by *certiorari*; and it would not be in our power to afford him redress by issuing the writ for which he asks. The superior court is clothed with general jurisdiction, both civil and criminal, and in nearly all its doings it proceeds according to the course of the common law. Any person aggrieved by any order, direction or ruling of the court in matters of law, or by a judgment thereof in matters of law apparent on the record, can obtain a revision of its proceedings by exceptions or appeal. Gen. Sts. c. 114, § 10; c. 115, § 7. The authority of the court over its officers and the power to remove an attorney for misconduct or malpractice, although conferred in express terms by Gen. Sts. c. 121, § 34, are nevertheless incident to all common law courts of general jurisdiction, and the proceedings in such cases are to be deemed to be taken according to the course of the common law

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Randall, petitioner for *mandamus*.

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The authorities are decisive that the doings of an inferior court in relation to such a subject matter cannot be revised or corrected, after judgment, by this court on a writ of *certiorari*. This subject was examined fully by this court in *Cooke, petitioner*, 15 Pick. 234, and it was there held that after final judgment in a court of record, proceeding according to the course of the common law, a *certiorari* ought not to issue and that it is only where the court below is not a court of record or does not proceed according to the common law that a *certiorari* is a proper remedy to correct or revise the proceedings.

*Petition dismissed.*

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**SAMUEL H. RANDALL, Petitioner for *mandamus*.**

This court will not issue a writ of *mandamus* directing the superior court to restore an attorney at law whom they have removed from practice, although such removal was made without any previous written charge of misconduct against him, and without any summons or other process to bring him before the court; especially if it appears that in fact he had notice of proceedings in that court, and appeared therein, and had ample time allowed to him, and a full hearing on the merits, and that, on the facts found by the court, the removal was proper, and that after alleging exceptions to the judgment of removal, which were disallowed by that court on the ground that the subject matter was not open to exception, he omitted to prosecute them in this court, by proving them under Gen. Sts. c. 115, § 11.

PETITION for a writ of *mandamus*. The petitioner set forth in his petition that in 1860 he was duly admitted to practise as an attorney, and by virtue thereof as a counsellor at law, in all the courts of the Commonwealth; that his name is still upon the records; that he has never resigned his said office, and knows of no legal cause why he should not be permitted fully to enjoy all the rights and privileges of the same; and that denial of his right to practise as an attorney is now made by the justices of the superior court. The prayer was for a writ of *mandamus* commanding the justices of that court to admit the petitioner to the practice of his office of attorney therein, or to show cause why he should be excluded therefrom.

An alternative writ was accordingly issued and served; and the chief justice of the superior court accordingly, in answer



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Randall, petitioner for *mandamus*.

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thereto, transmitted to this court a copy of the record of the proceedings of that court, at the October term thereof for criminal business in Boston in 1864, so far as the same disclosed any proceedings having any relation to the petitioner. This record set forth that "in the matter of Samuel H. Randall, an attorney at law, against whom charges of professional misconduct and malpractice have been made before this court, after a full hearing the following facts have been found." A detailed statement of facts then followed, respecting the petitioner's dealings with Michael Leighton, a client who had been committed to jail for failing to recognize to answer to a charge of larceny; for whom the petitioner then became a surety; and who thereupon enlisted as a substitute in the naval service of the United States, under a contract with the petitioner as to the disposition to be made of the money to be paid for the enlistment. The record then stated that an indictment against Leighton was presented in the superior court on September 12th 1864, "and on the 16th of September he was called to plead to said indictment; and the attention of the court was directed to the foregoing facts by the grand jury, and said Randall notified that upon the following Wednesday, September 21, the matter of his professional conduct and standing at the bar would be considered." A hearing accordingly took place on September 21st, at which the petitioner appeared, offered evidence and was heard. The record concluded thus: "Upon the foregoing facts, the court find that said Samuel H. Randall, in the making of said contract, in his acts in pursuance of it, and in his relations to said Leighton as his client, and affecting his interests, violated his oath of office as an attorney at law, and was guilty of malpractice and gross misconduct in his said office; and the judgment and order of the court is, that for these causes he be removed from the office of an attorney at law within this commonwealth. Lincoln F. Brigham, Justice of Superior Court."

The petitioner demurred to the above return, as an answer to the alternative writ, and assigned the following reasons:

"1. That it nowhere appears in said return there was any charge, specific or general, of any act of malpractice and gross

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Randall, petitioner for *mandamus*.

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misconduct by the petitioner, contained or referred to in any petition, complaint or other proceeding, filed of record in said superior court against the petitioner, as an attorney at law, as is required by law and the practice and usage of said superior court in proceedings for the removal of attorneys.

"2. That said return does not disclose the fact that said superior court had any lawful jurisdiction over the person of the petitioner as an attorney at law by the service and return of record of any summons, order of notice, or other process of said court, notifying the petitioner to appear before said court, at a day certain, to answer charges that had been preferred against him.

"3. That no legal cause, on the merits, is disclosed by said return, warranting the petitioner's removal from his office of attorney.

"4. That said return contains no legal record of the petitioner's removal from his office of attorney at law.

"5. That said return is so general, uncertain and indefinite, as to be invalid in law, as a sufficient return to the writ of *mandamus*."

The case was thereupon reserved by the chief justice for the determination of the whole court.

*H. W. Paine*, for the petitioner. The writ of *mandamus* is the remedy almost uniformly resorted to, to restore an attorney; 6 Bac. Ab. *Mandamus*, C; *People v. Justices of Delaware Common Pleas*, 1 Johns. Cas. 181; and this, not only where the inferior court which passed an order of removal had not jurisdiction, but also where it had jurisdiction, and it is sought to revise its conclusion upon the facts and its judgment upon the law. In the present case there was no petition filed, or information, or preliminary proceeding. For aught that appears, information such as Mr. Justice Brigham thought he could rely on was communicated to him, the petitioner was sent for, a hearing was had, and a conclusion arrived at, no charges being filed. The return to an alternative writ of *mandamus* must set out all the facts relied on. *Rex v. Mayor, &c. of Liverpool*, 2 Burr. 731. It is familiar, that before one is tried for an offence there must be a specification in writing. Declaration of Rights, art. 12, pt. 1.

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Randall, petitioner for *mandamus*.

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This is but a re-affirmance of a common law principle, and in every case where a man is charged with a crime or offence it must first be described to him. In all the reported cases brought to my attention, where a petition has been made for the removal of any attorney, there has been in some form a specification of charges.

*The petitioner* also filed a brief. Where a court has jurisdiction of the subject matter of any complaint or other proceeding some form of legal process must issue, notifying a party of the charge filed against him, in order to give the court jurisdiction over the person of the respondent. And where a court proceeds without having jurisdiction both of the subject and the person, its action is wholly void. *Brown v. Webber*, 6 Cush. 560. *Richardson v. Welcome*, *Ib.* 333. *Piper v. Pearson*, 2 Gray, 120. *Herrick v. Smith*, 1 Gray, 50. There could be no legal cause on the merits for the petitioner's removal from his office of attorney, where there was no act of any malpractice or misconduct complained of by any private or public prosecutor against him, and no legal summons whatever to appear; and the order of removal, which was a conclusion without legal premises, was an usurpation against law, whereby the whole proceeding was illegal and void *ab initio*. *Piper v. Pearson*, 2 Gray, 120. *Commonwealth v. Keith*, 8 Met. 531. *Regina v. Baines*, 2 Ld. Raym. 1273. *Rex v. Richardson*, 1 Burr. 536.

No counsel appeared to oppose the petition.\*

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\* *Mr. French*, in the preceding case, submitted the following argument on points involved in this case: 1. The judgment of removal is not a punishment or in the nature of a punishment for a crime or offence, and therefore the proceedings are not necessarily in the form of a charge for a criminal offence. Attorneys have been removed on conviction of crime; yet the removal has not been deemed in the nature of a punishment, but to have been made because a due regard to the dignity and decency of the court does not permit such fellowship. *Ex parte Brounshall*, Cowp. 829. The statute also provides that an attorney may not only be removed, but may be liable civilly and criminally. Gen. Sts. c. 121, § 34. Such removal is analogous to a divorce for crime. *Ferguson* was recently convicted of larceny, and removed from the bar on motion with no allegation against him or hearing whatever.

This is not a case civil or criminal, within the meaning of the statute allowing

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 Randall, petitioner for *mandamus*.
 

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BIGELOW, C. J. An alternative writ of *mandamus* having issued in this case, and a return thereto having been made by the chief justice of the superior court, setting forth that he transmits "a copy of the record of the proceedings of said superior court having any relation to the said petitioner," the question now arises whether this court are bound to issue a peremptory writ, commanding the superior court to admit the petitioner to the practice of his office of attorney in that court. By the record before us it appears that, at the October term of the superior court held at Boston in the year 1864 for the transaction of criminal business, it was found by that court that "Samuel H. Randall violated his oath of office as an attorney at law, and was guilty of malpractice and gross misconduct in his said office; and the judgment and order of the court is, that for these causes he be removed from the office of an attorney at law within this commonwealth." This adjudication is preceded by a statement signed by the presiding judge, setting forth in detail the facts on which his conclusions and judgment were based. These the petitioner does not seek to traverse or deny. By demurring to the return he must be deemed to admit all that is therein set forth, and to put his case on the single issue that, taking the record as it stands, it furnishes no warrant in law for the judgment of removal from his office, pronounced by the court below; that such removal was wrongful and erroneous; and that it is the duty of this court to reinstate the petitioner therein.

Upon careful and deliberate consideration of the case, thus

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exceptions. Gen. Sts. c. 115, § 7. It is a matter in which that court had final jurisdiction.

2. The power to remove an attorney for misconduct is incident to every court, and such removal is in the nature of a punishment for contempt. If the proceedings are sufficient for the punishment of a contempt, they are sufficient for this purpose. See *Heard v. Pierce*, 8 Cush. 338; *Tenney's case*, 3 Fost. (N. H.) 166; *State v. Matthews*, 37 N. H. 450; *Bryant's case*, 4 Fost. (N. H.) 149; 18 Law Reporter, 421, & seq.; *Ex parte Chetwynd*, *Re Mulock*, 4 Amer. Law Reg. (N. S.) 298. The Gen. Sts. c. 121, § 34, simply declare the common law as to the power to remove attorneys.

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Randall, petitioner for *mandamus*.

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presented, the court are unanimously of opinion that the petitioner fails to show any sufficient ground for the relief which he seeks. In the first place, it is too clear to admit of debate that in a proceeding of this nature, the doings of inferior courts cannot be revised or corrected in matters which are within their jurisdiction, and in regard to which they are authorized to exercise a judicial discretion, and to render a judgment according to the conclusions of fact and law at which they may arrive. If a party is aggrieved by the action of a judicial tribunal in relation to such matters, he must seek redress in other modes than by writ of *mandamus*. *Gray v. Bridge*, 11 Pick. 188. *Rea v. Commissioners of Middlesex*, 13 Pick. 225. *Strong, petitioner*, 20 Pick. 484, 497. This doctrine is not seriously controverted by the petitioner. He does not place his main demand for relief on the ground that the conclusion and judgment of the court below were erroneous as to matters of fact, or that the judgment of removal pronounced against him can be inquired into and revised here so far as it involves only an investigation of the merits of the case on which his removal was founded.

We are, then, in the next place, to consider whether he is entitled to relief on the other ground set up by him, namely, that the whole proceedings were unauthorized by law and invalid, because there was no rule, complaint or attachment made or issued, setting forth any act of misconduct or malpractice by him, and no summons or other process was ever procured, sent out or served to bring him before the court. For this reason he contends that the judgment and order of the superior court for his removal constituted a conclusion without legal premises, a usurpation against law, whereby the whole proceeding was illegal and void *ab initio*. The argument urged in support of this position is put on the ground that by this course of proceedings the constitutional rights of the petitioner were invaded, and that he was held to answer in violation of the 12th article of the Declaration of Rights of the Constitution of Massachusetts there having been no full, plain, substantial and formal description of any offence made or filed against him, and that he has

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Randall, petitioner for *mandamus*

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been thus deprived of his rights and privileges as an attorney contrary to the law of the land.

There would be great force in this argument, if it were clear that the proceedings for the removal of the petitioner were of a nature to come within the class of cases to which the provision of the Declaration of Rights on which the petitioner relies is applicable. But we do not think that it can in any just and proper sense be deemed a criminal procedure in which a party has a right to insist on a full, formal and substantial description of the matter with which he is charged, or that it is essential to the validity of the order or judgment of the court that it should be founded on legal process according to the signification of the words "*per legem terræ*," as used in Magna Charta and in the Declaration of Rights, that is, on complaint or indictment, followed by a trial in a regular course of legal and judicial proceedings. 2 Inst. 50. *Fisher v. McGirr*, 1 Gray, 37. On the contrary, at common law an attorney was always liable to be dealt with in a summary way for any ill practice attended with fraud or corruption, and committed against the obvious rules of justice and honesty. No complaint, indictment or information was ever necessary as the foundation of such proceedings. Usually they are commenced by rule to show cause, or by an attachment or summons to answer; but these are issued on motion or bare suggestion to the court, or even on the knowledge which the court may acquire of the doings of an attorney by their own observation. No formal or technical description of the act complained of is deemed requisite to the validity of such a proceeding. Sometimes they are founded on affidavit of the facts, to which the attorney is summoned to answer; in other cases, by an order to show cause why he should not be stricken from the roll; and when the court judicially know of the misconduct of an attorney, they will of their own motion order an inquiry to be made by a master without issuing any process whatever, and on the coming in of his report will cause his name to be stricken from the roll. Bac. Ab. Attachment, A, Attorney, H, and cases cited. *The King v. Southerton*, 6 East, 143. *In the Matter of Elsam*, 3 B. & C. 597; 5 C. 5 D. & Ry 389.

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Randall, petitioner for *mandamus*.

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Nor can a judgment of removal be properly and technically considered as a punishment for a crime or offence. In *Ex parte Brounshall*, Cowp. 829, Lord Mansfield said, "To strike an attorney from the roll" is not in the nature of a punishment, it is done "because he is an unfit person to practise as an attorney; the court exercise their discretion whether a man, whom they formerly admitted to the bar, is a proper person to be continued on the roll."

Such would seem to be the character of the proceedings under our statute, Gen. Sts. c. 121, § 34, which provide that removal from the bar shall not exempt an attorney from any other punishment which may be provided by law for his acts of malpractice and misconduct. If removal from the bar is to be regarded as a punishment for an offence, then it would follow that a person might be liable to two criminal prosecutions, be subject to two separate judgments, and be made to suffer two distinct punishments, for one and the same act or offence. We cannot think that the legislature contemplated any such result. The more reasonable inference is that the power of removal was given, not as a mode of inflicting a punishment for an offence, but in order to enable the courts to prevent the scandal and reproach which would be occasioned to the administration of the law, by the continuance in office of those who had violated their oaths or abused their trust, and to take away from such persons the power and opportunity of injuring others by further acts of misconduct and malpractice. Upon these grounds, we are of opinion that the petitioner fails to support the position on which he relies as the foundation for his claim to relief in this proceeding.

But there is another view of this case which seems to furnish decisive reasons for a refusal to issue a writ of *mandamus* to require the court below to restore the petitioner to his standing as an attorney. The proceedings as certified to us show that the petitioner appeared before that court to answer to the charges of misconduct and malpractice which had been brought to the attention of that tribunal by the grand jury in attendance thereon; that although there were no formal written charges preferred

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Randall, petitioner for *mandamus*.

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against him, he fully understood their nature and character, and was allowed ample time and opportunity to be heard thereon, and that he had a full hearing on the merits. The record now before us does not show that he raised the objection, on which he now insists, that he was not duly brought before the court by legal process, and that there was no proper allegation in writing of the misconduct imputed to him. But on recurring to the documents appended to the petition for a *certiorari* presented to this court at a former term, we find that such objection was made and overruled, and that the petitioner presented exceptions, setting forth the rulings on this point, which were not allowed by the court. These exceptions the petitioner did not attempt to prosecute by proving the same according to the provisions of Gen. Sts. c. 115, § 11. He thereby in effect abandoned them. It is not alleged in the petition for a *mandamus*, nor does the petitioner now aver, that he did not in fact fully comprehend the subject matter of the charges of misconduct made against him, or that he did not have a full hearing thereon; nor does he contend that the finding of the court in relation to the facts was not warranted by the evidence adduced at the hearing. Such being the state of the case, we are of opinion that the petitioner must be deemed to have waived any right to ask us to interfere by a writ of *mandamus* in his behalf, on the ground that there has been a technical omission to issue an attachment against him, or summons to appear, or a rule to show cause. Undoubtedly it would have been regular and proper to issue such process. But it was not essential, and the omission to issue it has worked no harm to the petitioner. Certainly he has alleged none, nor has he offered to show any. For aught that we see in the record, the finding of the court as to matters of fact was correct, and the judgment of removal well warranted by the evidence adduced at the hearing. If, therefore, we issued a writ of *mandamus* on the ground alleged by the petitioner that there was no proper process, the result would be that we should restore a person to his office who was unfit to hold it, and who might be removed therefrom immediately on due proceedings had. But a writ of *mandamus* is not a writ of



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Randall, petitioner for *mandamus*.

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right. It is within the discretion of the court whether it ought to be issued in each case that arises for adjudication. *Strong, petitioner*, 20 Pick. 497. *The King v. Commissioners of Excise*, 2 T. R. 385. It seems to us that we should be wanting in a sound judicial discretion, if, on the case presented by the petitioner, we interfered by a writ of *mandamus* in his behalf.

*Peremptory mandamus denied.*

**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME JUDICIAL COURT**  
**AT THE**  
**JANUARY TERM 1866, AT BOSTON.**

**PRESENT :**

HON. GEORGE T. BIGELOW,	CHIEF JUSTICE.
HON. CHARLES A. DEWEY,	
HON. EBENEZER R. HOAR,	
HON. REUBEN A. CHAPMAN,	} JUSTICES.
HON. HORACE GRAY, JR.,	
HON. JAMES D. COLT,	

**ESSEX COUNTY.**

**JOHN J. MARSH & another vs. EDWARD A. HAMMOND.**

The entry of "neither party" in an action is not evidence of a settlement or adjudication of the matters involved therein, and is no bar to a future action between the same parties and for the same cause.

Evidence that an insolvent debtor, a few months before the making of a conveyance which is alleged to have been fraudulent, represented to certain of his creditors that he should not be able to pay his debts to them at maturity, is admissible in favor of his assignees, in an action brought by them to set aside the conveyance.

Evidence that a person cannot write very well, and that his nephew, who had been his confidential clerk for several years, was in the habit of writing letters for him, is sufficient to authorize the introduction in evidence of letters appearing to be on his business, and written in his name by such clerk, for the purpose of proving his insolvency.

If an insolvent debtor has testified, in a writ of entry brought by his assignees to set aside a conveyance of real estate made by him on the day before removing with a stock of goods out of the Commonwealth, that the conveyance was not made to defraud creditors, and that he had no such intent in removing with his goods from the Commonwealth, letters written by him or by his authority shortly after reaching the place of his destination, and

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Marsh & another v. Hammond.

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tending to show that he had such fraudulent intent, are admissible in evidence for the purpose of contradicting him.

If the tenant in such writ of entry has testified that after he was summoned to appear as a witness before the court of insolvency, and before obeying the summons, he requested and had a meeting with the insolvent debtor out of this commonwealth, and there received from him a letter addressed to another person, and that he did not know and had no belief whether it was sealed or unsealed, or whether he saw or heard or knew the contents of it, and his appearance and mode of answering are such as to make the weight and credibility of his testimony, in the opinion of the presiding judge, a question for the jury and there is evidence tending to show that he delivered the letter to the person to whom it was addressed, and its contents, if known by the tenant, had a tendency to prove the alleged fraud on his part, the question whether or not he knew them may be submitted to the jury.

WRIT OF ENTRY brought by the assignees of George W. Lee, an insolvent debtor, to recover four parcels of land in Haverhill which were mortgaged by Lee to the tenant. At the trial in this court, before *Gray, J.*, the jury returned a verdict for the demandants, under rulings and instructions which are sufficiently stated in the opinion; and the case was reported for the determination of the whole court.

*D. Saunders, Jr. & E. Avery*, for the tenant.

*B. F. Brooks & S. B. Ives, Jr.*, for the demandants.

CHAPMAN, J. The first question is as to the refusal of the presiding judge to instruct the jury that in a former action between these parties, precisely like the present, the entry "N. P." was evidence of an adjudication and settlement of all matters involved in this action. But such an instruction would have been erroneous. The entry "N. P." does not indicate any adjudication. It means nothing more than that neither party appears further in the action. This is equivalent to a nonsuit and default by consent, after which no judgment can be rendered by the court. As evidence of an agreement of the parties it cannot be interpreted to include more than an abandonment of the action; and in no sense can it be regarded as a bar to a future action, or as evidence to affect the present action. It was properly excluded.

In order to discuss the other questions properly, it is necessary to state the point at issue. George W. Lee had on the 17th of October 1861 executed to the tenant four mortgages. On the 9th of the following November proceedings in insolvency were instituted against him by his creditors, and the demandants

were appointed assignees of his estate, and have brought this action to recover the mortgaged premises on the ground that the mortgages were fraudulent as against creditors. The allegation and denial of this fraud formed the issue on trial. In order to establish the fraud of Lee, the mortgagor, it was necessary to prove his fraudulent intent, and in establishing this it was proper to prove his pecuniary condition. The evidence that he obtained an extension of his notes about to fall due the preceding spring by representations to the holders of them that he should not be able to pay them at maturity, tended to prove that he knew himself to be insolvent at that time, and the objection to it is groundless.

Several letters which purported to be written in behalf of Lee by one Hall were offered in evidence and objected to. They were written prior to the execution of the mortgage, and, if written by the direction of Lee, tended to prove his insolvency. One objection to them was, that there was not sufficient evidence to be submitted to the jury that Hall had authority from Lee to write them. The evidence on this point was that Hall was a nephew of Lee and was brought up by him; that Lee had carried on business as a dealer in shoes in Haverhill till about the 18th of October, when he removed to Chicago, where he had sent his stock of goods; that both in Haverhill and at Chicago, Hall was employed by him in his business, and was his confidential clerk; and that Lee did not write very well, and Hall wrote many of his letters. Two of the letters were written to Faxon, Elms & Co., of Boston, who were his creditors. They were dated in July 1861, and proposed terms of compromise, and the last one contained cash and a note signed by Lee's own hand for the balance of the debt. Three others were written to Bulkley & Lapham of New York, creditors of Lee, dated in August 1861. The first two asked for terms of extension, and the last one contained a check for a part of the debt, and a note for the balance, both signed by Lee's own hand. All this evidence tended to prove that the letters were written by Lee's direction. It was for the jury to determine whether it was sufficient to prove the fact, and the letters were properly admitted in evidence, to be used as statements of Lee tending to

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Marsh & another v. Hammond.

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prove his insolvency, if the jury should be satisfied that they were written by his direction.

The tenant read the deposition of Lee, in which he testified that the mortgage was made to the tenant in good faith to secure a note of \$20,000; that the tenant lent him \$19,200, and he owed the tenant the note; that the mortgage was not made to defraud creditors, and that he had no such intent either in making the mortgage, in removing his goods to Chicago, or in going there himself. He stated several circumstances to corroborate this general statement. He also stated that he wrote to most of his principal creditors after he had come to Chicago, and after he had found that he could make no collections from his southern debtors, to give him an extension of two years. To contradict this statement on the subject of fraud, the demandants offered a letter dated Chicago, October 22d 1861, addressed to Howe Brothers of Boston, creditors of Lee, and three others of similar tenor addressed to other creditors, asking for an extension of two years; but containing statements tending to contradict his testimony, and offering to pay them if they would take real estate at what it was worth eighteen months previous. They were in the handwriting of Hall; and were signed, as some of the previous letters were, "G. W. Lee," and under it "H." The evidence above mentioned was sufficient to authorize the reading of the letters to the jury, with the instructions given that if Hall was authorized to write them, which was a question for the jury, they were admissible for the purpose of contradicting Lee and affecting his credibility, but for no other purpose.

The demandants offered, for the same purpose, another letter to Samuel Elliot of Haverhill, dated Chicago, October 28. It was in Hall's handwriting, but it contained a mortgage to Elliot, of the same date, signed by Lee, so that there was sufficient evidence to be submitted to the jury that this was written by Lee's direction. The language of the letter taken in connection with the contents of the mortgage tended to show that Lee regarded the land mortgaged to the tenant as being then subject to be taken by his creditors, and thus tended to contradict his testimony.

The tenant himself was a witness, and testified that after he was summoned to appear before the court of insolvency, and before he obeyed the summons, he requested Lee, who was then at Chicago, to meet him at Albany. He made this request, because he did not think he could get Lee to come to Boston. They met at Albany, November 11th 1861.

He stated that he there received from Lee a letter addressed to the demandant Marsh; he did not know and had no belief whether the letter was sealed or unsealed, or whether he saw or heard or knew of its contents. His testimony upon the question of his knowledge of its contents, was given in the course of a long cross-examination in which his appearance and mode of answering were such as to make the weight and credibility of his testimony upon this point, in the opinion of the presiding judge, a question for the jury.

It appeared that a letter was left at Marsh's office about the middle of November, which the jury might properly infer was the letter above mentioned; that Marsh was then acting as counsel for the petitioning creditors against Lee; that soon afterwards he met the tenant at the court of insolvency, and the tenant said to him that he had sent him a letter which Lee had given him for him. The tenant was at that time obviously interested in suppressing any inquiry into the validity of his mortgage, especially if it was fraudulent. If the creditors or their attorney could be persuaded to give Lee further time, it would tend to suppress such inquiry. The letter of Lee not only asks Marsh to endeavor to persuade them to this course, but to act as Lee's attorney in the matter, promising him a compensation for it, and further requests him to treat the letter as confidential. The circumstances under which the letter was written and conveyed to Marsh, taken in connection with its contents, were sufficient to authorize the jury to infer that it was written by the defendant's procurement for the purpose which the letter indicates, and the letter was properly submitted to them as tending to establish the fraud alleged. The court are of opinion that all the evidence objected to was properly admitted, and that the instructions respecting it were carefully guarded.

*Judgment on the verdict.*

## COMMONWEALTH vs. BENJAMIN F. FIELD.

The superior court have authority to allow a commissioner, specially appointed to take a recognizance from a person under indictment, to file an amended return thereof, setting forth a different contract, three years after the filing of his original return, after the parties to the recognizance have been defaulted, and after an action has been commenced thereon; and such action may thereupon be maintained by proof of such amended return. If a person under indictment for assault, abduction and kidnapping has been committed to jail upon a *mittimus* which contains an order for his commitment for failing to recognize with sureties to answer to an indictment for kidnapping, a recognizance afterwards taken with condition that he shall answer to an indictment against him for assault, abduction and kidnapping is valid; although after the taking of the recognizance but before the sureties therein are defaulted the charge of kidnapping is abandoned.

Under the Gen. Sta., the superior court have authority to require a prisoner who has filed exceptions after a verdict of guilty has been returned against him, to enter into a recognizance to appear from term to term in that court, to answer to the indictment.

**CONTRACT** upon a recognizance. This was one of the two actions the decision in which is reported in 9 Allen, 581.

After that decision, a motion was made in the superior court, before *Lord, J.*, at May term 1865, for leave to file an amended memorandum of the recognizance, and this motion was allowed, and the following memorandum of the recognizance was accordingly filed:

“Commonwealth of Massachusetts. Superior court, Essex, ss. In vacation after January term, A. D. 1862. On this twenty-seventh day of February, A. D. 1862, personally appeared Amos R. Nickerson as principal and Benjamin F. Field of Boston and Isaac H. Hazeltine of West Newton as sureties, before me duly authorized hereto, said Nickerson being now in the jail in Salem in said county, committed there under a *mittimus* from said court for failing to recognize in the sum of \$8000, as ordered by said court, on an indictment against him pending therein, numbered 784, and acknowledged themselves to be severally indebted to the Commonwealth of Massachusetts in the sums following, to wit: the said Nickerson as principal in the sum of eight thousand dollars, and the said Field and Hazeltine severally as sureties in the sum of eight thousand dollars, to be levied on their goods or chattels, lands or tenements, and in want thereof

upon their bodies, to the use of the said Commonwealth, if default be made in the performance of the condition hereunder written.

"The condition of this recognizance is such, that if said Nickerson shall appear at the next criminal term of this court for said county to be holden at Newburyport, in and for said county, on the second Monday of May next, and from day to day during said term of this court, to answer to an indictment pending therein against him for assault, abduction and kidnapping of one Rice as set forth at large in said indictment, and shall also appear from term to term of this court, for the transaction of criminal business, if the same shall be continued, until final judgment shall be rendered thereon, and not depart without license, but shall abide the final order, judgment and sentence of the court therein, then this recognizance shall be void; otherwise shall remain in full force and effect. Asahel Huntington, commissioner specially authorized to take bail in the premises."

The case thereupon proceeded to trial, before the same judge, without a jury, and the following facts were found to be proved by the evidence:

At January term 1861 an indictment was found against Nickerson and Edwin P. Smith and Caleb B. Watts, for assault, abduction and kidnapping, upon which the two former were tried and a verdict of guilty was rendered at January term 1862, to wit; in February 1862. (See 5 Allen, 518.) Exceptions were taken, and Nickerson ordered to recognize in the sum of \$8000, with sufficient sureties in a like sum, to appear and answer to said indictment at said January term, and at any subsequent term to which the indictment might be continued, and so from time to time and from term to term until the final decree, sentence or order of the court thereon, and to abide such final decree, sentence or order; and Asahel Huntington was authorized to take the recognizance in vacation. Upon failure to recognize as ordered, Nickerson was committed to jail by virtue of a *mittimus* which ordered the jailer to hold him until he should recognize to appear and answer to an indictment wherein he was charged with the crime of kidnapping; and the court



adjourned without day on the 24th of February, and on the 27th of February 1862, at the jail in Salem, before Mr. Huntington, Nickerson as principal and the defendant Field and Isaac H. Hazeltine as his sureties recognized to the Commonwealth severally in the sum of eight thousand dollars, in the manner and upon the conditions set forth in the new memorandum of recognizance filed by Mr. Huntington, and copied above. Nickerson was discharged from custody on the same day, and Mr. Huntington (being clerk of the court) on the same day made the following entry upon the docket of the superior court: "Defta. A. R. N. and E. P. S. as prs. each in \$8000; Benj. F. Field of Boston and Isaac H. Hazeltine of West Newton, sureties for each of prs. in \$8000 rec. severally in jail, Feb. 27, 1862, and discharged on their several recognizances. A. H. Commissioner." At May term 1862 Mr. Huntington filed a paper purporting to be a memorandum of said recognizance, and the filing of the same was minuted upon the docket. The exceptions taken as aforesaid were overruled in March 1863, as to the first count of the indictment; (See 5 Allen, 518;) the indictment was continued until May term 1863, when a *nolle prosequi* was entered as to all but the first count, and Nickerson was called and defaulted on his recognizance; and the indictment was further continued until October term 1863, when the sureties were called and defaulted on the recognizance. The memorandum of the recognizance filed in May 1862 was the only one filed in the case until May term 1865, when Mr. Huntington was allowed to file an amended memorandum, as before stated.

The defendant excepted to the allowance of the motion for leave to file the amended memorandum; and also objected to the sufficiency of the evidence to maintain the action, upon the following grounds:

1. The recognizance was not one which the superior court had authority to order or require, because the prisoners should have been required to recognize to prosecute their exceptions in the supreme court, and not to appear from term to term in the superior court.
2. The amended recognizance, filed after the commencement

of this action, is not admissible in evidence, and sets forth and describes an entirely different contract from that set forth and described in the original memorandum, which was the only one on file for three years and more after the recognizance was taken, and the court had no right to allow such amendment, to affect the rights of the defendant.

3. The commissioner taking the recognizance had no authority to take the recognizance set forth in the amended memorandum, in this, that the principal Nickerson was committed to jail, as appears by the *mittimus*, for failing to recognize with sureties to answer to an indictment against him for the crime of kidnapping, and the recognizance taken, as appears by the said memorandum, is conditioned that the principal shall answer to an indictment against him for assault, abduction and kidnapping of one Rice, and more especially as it appears from the records put in by the Commonwealth that before any default of the defendant the charge of kidnapping against said Nickerson was discontinued and abandoned.

But the judge ruled that the Commonwealth could maintain the action, and ordered judgment to be entered against the defendant for \$8750. The defendant alleged exceptions.

*J. G. Abbott, (D. Saunders, Jr., with him,)* for the defendant. The superior court, under the circumstances, had no authority to allow the amendment, so as to affect the rights of the defendant. Three years had elapsed after the filing of a memorandum, full and perfect in all its parts, which became a matter of record, and by which the parties to the contract so recorded had a right to consider their liabilities fixed and settled. Upon this memorandum the defendant had been defaulted, and this suit was commenced and prosecuted until a decision was had that the contract which it described was one which the commissioner had no authority to require. The new memorandum is in no respect an amendment of the former one; but it sets forth a new and distinct contract from that set forth in the former one. The only cases where an amendment of a memorandum of a recognizance taken by a commissioner has been allowed, have been to enable him to make a new memorandum, more full and complete; not

one setting forth a different contract. *Commonwealth v. M<sup>r</sup> Neill* 19 Pick. 127. *Commonwealth v. Merriam*, 9 Allen, 371. But there is no case where an amendment has been allowed, setting forth a new, different and inconsistent contract. And it would be highly dangerous to permit a commissioner, three years after returning into court his original memorandum, to make a new one, from memory, describing a different contract, and file it as a record by which the rights of parties are to be governed. It is a record of what takes place in the country, after the adjournment of court, and of which the court can know nothing except from the memorandum. In this case it is certainly safer to take the original recollection of the commissioner. During three full years the contract now relied on remained in the breast of the commissioner, and depended on the mere recollection of a ministerial officer. It is against the policy of the law to allow such an officer to come in, after the lapse of so long a time, and file a new contract, inconsistent with the contract formerly set forth.

The new memorandum seriously affects the rights of the sureties. They had a right, by Gen. Sts. c. 170, §§ 42, 43, to surrender their principal by leaving a certified copy of the recognizance with the jailer. Their only evidence of the recognizance was the record. For three years, by the record, their recognizance was void. If void on the face of it, they would have no right to take their principal and surrender him. By this record of a void contract the sureties were bound for three years, and until it was too late to protect themselves; and then it was proposed to make a new record and by it to charge them for the first time, when their power of protecting themselves was gone. Yet both principal and sureties were bound and are presumed to know the law. So long as the original memorandum stood, therefore, this defendant was justified in not attempting to protect himself; he was guilty of no laches in not surrendering his principal; and he had no right to do it.

This action cannot be sustained on the new memorandum. It was commenced on the original memorandum; and upon that the defendant was defaulted. There has been no default upon the contract now set up. The default that was entered

was upon a different and an illegal contract; and of course it was no default.

The recognizance as now set forth is one which the commissioner had no authority to take. He should have followed the *mittimus*. He was a ministerial officer. On complying with the *mittimus*, the prisoner was entitled to his enlargement. If anything more was required of him, such requirement was illegal. *State v. Buffum*, 2 Fost. (N. H.) 267. The recognizance sets forth two crimes not alluded to in the *mittimus*. The defendant could look only to the *mittimus*. He knew that the charge of kidnapping could not be sustained, as the court have decided. He knew that it was safe to agree that the prisoner should answer that charge; and he had a right to suppose that if any other charge was put in by the commissioner it would render the whole contract void.

The court had no authority to require such a recognizance as the one now relied on. The order should have been that Nickerson should recognize to prosecute his exceptions. This clearly would have been the proper order, prior to *St.* 1859, c. 196, creating the superior court; and it is so still. See Gen. Sts. c. 115, § 12; c. 173, §§ 9, 10. The provisions of Gen. Sts. c. 115, § 12, do not apply to criminal cases. See *Commonwealth v. Bestin*, 11 Gray, 54; Gen. Sts. c. 170, §§ 39, 46.

*S. B. Ives, Jr.*, for the Commonwealth. The superior court had power to allow the amendment. It was a record of its own, made by its own clerk or its own commissioner. *Balch v. Shaw*, 7 Cush. 282. *Fay v. Wenzell*, 8 Cush. 315. If not allowable on this ground, the case is within that class of cases in which officers have been allowed to amend their own returns, or in which the discretionary power of the court to allow or refuse such amendment has been affirmed. *Hitchings v. Ellis*, 1 Allen, 476, and cases cited. *Baxter v. Rice*, 21 Pick. 197. *Thatcher v. Miller*, 11 Mass. 413. The lapse of time affects only the question whether the court properly exercised its discretion. The relation between principal and surety depends on the actual contract between them; not on the record evidence of that contract. No record of the recognizance is essential to

this. While Mr. Huntington was walking from the jail to his office, was there not a recognizance? A recognizance is seldom extended until it is necessary to sue upon it. But at all times after the verbal recognizance is taken the parties are held. And if so, it makes no difference whether the amendment is made *pendente lite*, or only after default. The default fixes the rights of the parties; and the default is upon the recognizance, not on the memorandum of it. And the suit is also upon the contract; and the memorandum is merely evidence of the contract. It is true that it is the only competent evidence; but does it therefore follow that any particular memorandum is the only competent evidence? The question is, what was the contract? See *Commonwealth v. Merriam*, 9 Allen, 371; *Commonwealth v. Nye*, 7 Gray, 316; Gen. Sts. c. 170, § 49.

It was within the authority of the superior court to require the parties to recognize to appear further in that court. Gen. Sts. c. 114, §§ 11, 12; c. 115, § 12; c. 112, §§ 11, 26, 33, 35, 36; c. 170, § 39; *Joannes v. Underwood*, 6 Allen, 240.

DEWEY, J. In the aspect in which this case now presents itself, the first question proper to be considered is as to the competency of the amended memorandum of the recognizance filed by Mr. Huntington, the commissioner, by leave of the superior court at May term 1865. This recognizance, as now extended, is in correspondence with the declaration, and is not open to the objection taken to that filed on May 12th 1862. This amended recognizance is objected to by the defendant, as setting forth a different contract from that stated in the former one, and as having been allowed after the commencement of the present action, and after the lapse of a period of three years from the time when the former recognizance was filed. The facts upon which the objection is raised duly appear, and the question is merely as to their legal effect.

If this can be treated as an ordinary amendment of the records of the court or of an official return by an officer, clearly the decisions of this court would sustain it. The lapse of time would furnish no legal objection to it, although it might call for great circumspection before granting it. Nor would it be a

valid objection that it was done after the commencement of the action, or that it affected the legal rights of the parties, and changed their liabilities from what they would have been before the amendment. *Balch v. Shaw*, 7 Cush. 282. *Haven v. Snow*, 14 Pick. 28. *Johnson v. Day*, 17 Pick. 106. *Baxter v. Rice*, 21 Pick. 197.

It would seem, therefore, that if the recognizance had been wholly a proceeding in court, and if it was to be treated as the ordinary records of the court, there would be no question as to the amendment allowed by the court. The commissioner seems to have assumed that it was so, and, being himself the clerk of the court, made brief entries of his doings upon the docket, as he would in other cases. In fact, however, the recognizance was taken by Mr. Huntington as a special commissioner appointed by the court to take this particular recognizance, the order for recognizing having been given by the court, and the amount thereof fixed by the order. Under this order, three days after the adjournment of the court, the commissioner, at the jail, upon the request of the principal, Nickerson, took a recognizance and noted the fact of so taking it upon the docket of the clerk, under the case on the docket, and on the 12th of May 1862 filed an extended recognizance. This extended recognizance, in the form set forth, was found not to correspond with the order of the court, and, as the commissioner represented to the superior court, not to be a correct extension of the one actually taken, and he asked leave, upon discovery of this fact in 1865, to file a true extended recognizance, and one corresponding to that actually taken by him; and the superior court, being satisfied of the truth of such representation, allowed the same, against the objection of the defendant. The fact that there has been ostensibly a full and correct recital of the proceedings in the original return of an extended recognizance does not prevent the making of an amended return at a subsequent time, if the first be in fact erroneous. The case of *Commonwealth v. M'Neill*, 19 Pick. 127, was that of a return made by a lower court to a higher one of an extended recognizance, and where the objection to a material change in the same would seem much stronger, but the court

below was allowed subsequently to send up a more full and perfect recital of the actual recognizance. The case of *Commonwealth v. Merriam*, 9 Allen, 371, is however more analogous to the present case, being that of a recognizance to appear at the same court that ordered it, and it was also a recognizance taken by a commissioner of the same. A second extended return, correcting certain imperfections in the first, was allowed to be made by the commissioner, after the parties had been called and defaulted on their recognizance. That case we think substantially settles the question of the right of the court to give full effect to the amended return. It differs from the present case in this, that here it was after the commencement of the suit, but in that it was after a default, which is an equally essential part of the proceeding necessary to charge the party.

The principle upon which this right to make a second extended return rests seems to be, that the binding effect of a recognizance does not depend upon its being fully written out when the party recognizes. The briefest memoranda as to the fact, made by the clerk, or a commissioner, if taken out of court, are sufficient to authorize the party taking the same to make a full return subsequently, and, if this be imperfectly or erroneously set forth, to amend the same according to the truth, and return the same in accordance with the actual facts.

In the present case, the commissioner had the brief memoranda made by him, either as clerk or commissioner, containing an order of court to take the same, on the 24th of February 1862, and showing that a *mittimus* duly issued, and that Nickerson and Smith, as co-defendants in this indictment, were on the 27th of February in jail, and discharged on their several recognizances; and also the first return of an extended recognizance filed May 12th 1862.

The superior court, at their term holden in May 1865, finding upon satisfactory evidence that the recognizance filed May 12th 1862 was an erroneous and inaccurate statement of the contract entered into by said Nickerson, and Field as his surety, properly ordered and allowed said amended and substituted memorandum of recognizance to be filed and entered of record

as the true recognizance actually entered into by the parties, and obligatory upon them as such.

We see no objection to the recognizance on the ground of misrecital of the offence with which the party was charged. It properly refers to the indictment for the more full description of the same, as did the *mittimus* also.

It is then further contended that the superior court had no authority to require the party to enter into such a recognizance as the present.

It appears that on the day the recognizance was ordered the case was pending in that court, a verdict of guilty having been returned against Nickerson, and exceptions to the ruling of the court in matter of law had been filed and allowed, which exceptions were required by statute to be entered in the supreme judicial court for the Commonwealth, to be holden at Boston.

That at any previous stage of the case before the filing of the bill of exceptions the superior court had power to require the party to enter into a recognizance like the present, we suppose cannot be questioned. That is a court having a criminal jurisdiction extending to most crimes and offences, and, as incident to its jurisdiction, it was fully authorized to take recognizances for the personal appearance of a party charged with an offence within its jurisdiction, during the time and the whole time that such case might be pending before it. In *Commonwealth v. Nye*, 7 Gray, 316, this court recognized and applied this doctrine to the court of common pleas, the predecessor of the superior court.

The doubt as to the validity of the present recognizance arises solely from the provisions of Gen. Sts. c. 173, § 9, in reference to recognizances required to be taken where the party has, upon conviction by jury in the superior court, filed exceptions in matters of law, and those exceptions are to be heard by this court. If the only recognizance the superior court was authorized to require was that recited in this section, the present one was invalid, and the party is not bound by the same. The form of recognizance there prescribed is a reenactment of Rev. Sts. c. 138, § 13, and was exactly adapted to the jurisdiction of the various courts,



and to the course of proceeding in criminal cases removed to this court by bill of exceptions, as the law existed prior to the passage of *St.* 1859, c. 196, abolishing the court of common pleas, and creating the superior court with greatly enlarged jurisdiction, and changing essentially the manner in which questions should be brought before this court as a court for hearing exceptions and other matters of law raised in the superior court. Bills of exceptions, instead of being heard before the supreme judicial court for the county of Essex, were to be heard before the supreme judicial court for the Commonwealth at Boston. The case itself was not transferred to that court, but only the question of law raised, and its whole duty was to send a rescript to the superior court, where the case was pending, and where final judgment was to be entered. In this state of the statute law it was assumed, and as we think correctly, that the provisions of *Rev. Sts. c. 138, § 13*, were virtually abrogated, being inconsistent with the whole tenor of *St.* 1859, c. 196, in reference to bills of exceptions and the removal of cases.

But it is said that although such might have been the effect of *St.* 1859, c. 196, it cannot be so held since the enactment of the *Gen. Sts.*, as the provisions as to the jurisdiction of the superior court, and the *Gen. Sts. c. 173*, were thus all simultaneously adopted, and thereby the latter have revised the provision of the *Rev. Sts. c. 138*. This is so in form, and yet the public documents printed by the legislature in connection with the *Gen. Sts.* clearly show how this apparent conflict of provisions, on the reënactment of the old statute as to recognizances, happened. The *Gen. Sts.*, as revised and proposed by the commissioners for the sanction of the legislature, were drawn up, reported and published in 1858, at the time of the existence of the court of common pleas, and were properly adapted to the jurisdiction of the various courts as then existing. The *St.* of 1859, abolishing the court of common pleas, and materially changing the jurisdiction of the court and the course of proceedings on bills of exceptions, then just passed, was to be incorporated into the *Gen. Sts.* before their final adoption and enactment by the

legislature in December 1859, and the attempt was made to insert the necessary new and expunge all old sections which this change required. But this particular provision as to recognizance in cases of bills of exception probably escaped observation, and was not stricken out. Assuming, however, that we are to deal with it as a statute provision unrepealed, yet, if we find it wholly inapplicable to a case like the present, and in conflict with other existing statute provisions, we must treat it as nugatory, or at least as not to be so applied as to defeat the general system prescribed by the statutes regulating the jurisdiction of the various courts in the cases pending before them. The form of the recognizance as required by c. 173, § 9, requires the party to recognize "for his personal appearance at the supreme judicial court next to be held for the same county." But that court had no cognizance of this case. The recognizance, if returned and filed there, would have no case there. The case was to continue in the superior court; the question of law raised by the bill of exceptions was to be heard by the supreme judicial court for the Commonwealth sitting in Boston; and from that court a rescript was to be forwarded to the superior court. All these proceedings might take place before any regular term of the supreme judicial court which might be held in the county of Essex.

In view of the statutes as to the jurisdiction of the superior court, and the entire new system introduced as to retaining the case in that court, notwithstanding a bill of exceptions is allowed, and the further fact that the case was in no event to be transferred to the supreme judicial court for the county of Essex, the court are of opinion that the superior court properly ordered the recognizance in the present form, and that the same is valid and binding upon the parties, notwithstanding the objections urged against it.

*Exceptions overruled.*

**FANNY EATON vs. BOSTON AND LOWELL RAILROAD COMPANY**

It is no defence to an action by a passenger against a carrier to recover damages for an injury sustained through their negligence, that the negligence or trespass of a third party contributed to the injury, although such third party acted entirely independently of the carrier.

The above rule is not affected by *St. 1851, c. 128*, authorizing certain railroad companies, of which the defendants were one, to use a common track, and regulating the manner of such use and their liability for accidents upon the same.

**TORT** to recover damages for a personal injury sustained by the plaintiff, while a passenger in a car of the defendants.

At the trial in this court, before *Dewey, J.*, the following facts appeared: The injury was received on a portion of the Essex Railroad used in common by the defendants and the Eastern Railroad, under the authority of *St. 1851, c. 128*, the material portions of which are referred to in the opinion. The wheels of a wagon loaded with hay, which the driver was attempting to take from the highway along the railroad track to certain private premises, were caught between the rails and the planking, outside of the limits of the highway, and there held fast; and while in this position, the defendants' train, in which the plaintiff was a passenger, came from South Danvers towards Salem, around a curve, and was stopped just as it reached the load of hay. The train run by the Eastern Railroad Company from Lawrence to Salem was almost due. The defendants sent a flagman to stop that train, and were endeavoring to remove the load of hay, when that train came rapidly round the curve and ran into the defendants' train, thereby causing the injury to the plaintiff.

The defendants offered evidence tending to show that the train of the Eastern Railroad Company might have been stopped soon enough to avoid the collision, after the flagman was sent back, and might have been seen by the engineer of that train, and that the conductor of that train, knowing the time when the defendants' train left South Danvers, did not delay his train for the time fixed by the time-tables before starting, but started too soon and at too great speed, and that the collision was caused by

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the carelessness of said engineer and conductor. They also contended that the driver of the team attached to the wagon was where he had no right to be, and was careless in allowing the wheels of the wagon to become caught as they were.

The defendants asked the following instructions :

"1. If the stopping of the load of hay, over which the defendants had no control, on the track of the railway contributed to the happening of the accident by which the plaintiff was injured, then the defendants are not liable, although their own negligence may have also contributed to it.

"2. If the injury to the plaintiff was occasioned by negligence on the part of another railroad corporation, having the right to use the same track with the defendants, and by the negligence of the defendants, then the defendants are not liable.

"3. The defendants were not bound to attempt to remove the passengers from their cars, under the circumstances of this case.

"4. If the injury to the plaintiff was occasioned by the negligence of some person over whom the defendants had no control, in driving a load of hay on the track, and the negligence of the defendants in not sending back a messenger soon enough to stop an approaching train belonging to another corporation, having the right to use the same track, then the defendants are not liable.

"5. If the train of the defendants was stopped by a load of hay on the track, over which they had no control, and if, while the train was standing on the track, waiting for the removal of the hay, and while the defendants' servants were attempting to remove it, the train was run into by the train of another company having the right to use the same track, then the defendants are not liable for the injury to the plaintiff, although they might have sent back some one to stop the approaching train sooner than they actually did do it, if, by sending back such person as soon as it could be done, the collision of the trains could not have been prevented."

The fifth of the defendants' prayers for instruction was adopted by the judge, and the jury instructed in accordance therewith.

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As to the others, the jury were instructed as follows :

“ That the fact that the obstruction to the track was caused by the driving of a load of hay upon the same, and the same being there by accident or negligence, does not relieve the defendants from liability, if they were guilty of negligence as to the duty required of them to see that effectual measures were taken to prevent the approaching train from running into the Lowell train thus delayed by the obstruction.

“ That it would be the duty of the defendants, if running under an arrangement by which the Lawrence and Salem cars were to follow them on the same track, in such short period of time as would endanger the safety of the passengers on the Lowell train, to provide and use the necessary means to guard against injury to their passengers by reason of such running by the Lawrence and Salem cars, in case of any stoppage of the defendants' train by reason of an obstruction upon the road rendering the same impassable by the defendants' train.

“ In making such provision, proper consideration should be given to the customary mode of running trains, and the ordinary variance from the time-table, in the time of their actual arrival at given points.

“ In reference to the duty of the defendants, upon meeting an obstruction to the progress of their train, to give notice to their passengers of the expediency of their leaving the cars to avoid the impending danger from the approach of the Salem and Lawrence cars, the jury will judge ; and if they find that no other effectual means could then be used to avoid the injury that would arise from their exposure to be run into by the Lawrence and Salem cars, and that this would have been effectual, and might have been done, giving the passengers sufficient time to leave the cars, it will be for the jury to say whether the omission so to do was a neglect of duty on the part of the defendants, for the consequences of which they are responsible — the jury taking into consideration the actual state of the cars and the opportunities that existed for the removal of the passengers from them.”

The jury were further instructed that any arrangement

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consented to and sanctioned by the defendants, by which these two trains of cars were run upon the same track, and the Lawrence and Salem train was to follow the defendants' train in so short a period that there could be in ordinary cases no adequate provision to give notice to the Lawrence and Salem cars of an obstacle on the track, so as to enable them effectually to check their engine and prevent a collision with the cars of the defendants' train, and avoid endangering the lives and persons of the passengers, would be a neglect of duty and make them responsible to the passengers, if injured by the Salem and Lawrence train running into and upon that of the defendants, for want of notice of the detention of the defendants' train by an obstacle obstructing the railroad track.

The jury were also instructed that if the injury to the plaintiff was caused by the improper acts of the Eastern Railroad Company solely, or through their negligence in the management of their train, and by acts in which the defendants did not participate, and over which they had no control, the Eastern Railroad Company are the proper parties to be held responsible for the injury to the plaintiff, and the defendants would not be responsible for the same; and that if the defendants, by their own negligence while conveying the plaintiff in their cars, caused or permitted the injury to happen to the plaintiff, the fact that the Eastern Railroad Company, running the Lawrence and Salem cars, had also been guilty of negligence in running their cars, which contributed to the injury, would not prevent the defendants from being charged in this action for the injury to the plaintiff.

The jury returned a verdict for the plaintiff, with \$1100 damages; and the case was reported for the determination of the whole court.

*J. G. Abbott & B. Dean*, for the defendants. 1. Under the instructions, the jury may have been of opinion that, if the Eastern Railroad Company's servants had not been guilty of negligence, they might have stopped their train in time to avoid a collision. The first question therefore is, if a railroad train is stopped on the track without the fault of its managers, and such

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precautions are used that an approaching train of another corporation need not, except through negligence, run into it, but such approaching train by negligence does run into it, whether the corporation running the first train are liable for the damages that follow. This view of the case is not altered by any of the instructions given at the trial. The defendants contend that under these circumstances they are not liable. 2. Under *St.* 1851, c. 128, § 6, the remedy must be sought against the two corporations jointly, by whose joint act, neglect or default the injury was occasioned, or against all three corporations jointly using the road; or the act, neglect or default must belong solely to the company sought to be charged. See *Davis v. Dudley*, 4 Allen, 557; *Wright v. Malden & Melrose Railroad*, *Ib.* 283; *Holly v. Boston Gas Light Co.* 8 Gray, 132; *Rowell v. Lowell*, 7 Gray, 100; *Kidder v. Dunstable*, *Ib.* 104; *Murdock v. Warwick*, 4 Gray, 178; *Marble v. Worcester*, *Ib.* 395. 3. The *St.* of 1851 provided the tribunal for the settlement of the arrangements for the joint management of said railroad, and the defendants are not responsible for damages resulting to third persons because of any want of safety in the management fixed upon.

*J. C. Perkins & W. C. Endicott*, for the plaintiff, besides some of the cases cited in the opinion, cited *Peck v. Neil*, 3 McLean, 22; *Talmadge v. Zanesville, &c. Road Co.* 11 Ohio, 197, 218; *Lockhart v. Lichtenthaler*, 46 Penn. State. R. 151; *Laing v. Colder*, 8 Penn. State R. 479, 483; *Simpson v. Hand*, 6 Whart. 311, 322; *Stokes v. Saltonstall*, 13 Pet. 181; *Thorogood v. Bryan*, 8 C. B. 115; *Derwort v. Loomer*, 21 Conn. 245, 254, 255; *Dudley v. Smith*, 1 Camp. 167.

COLT, J. At the time of the injury complained of, the relation of passenger and carrier existed by contract between the plaintiff and the defendants; they had received the plaintiff upon their cars, and were bound to the exercise of all that care and caution which the relation imposes. The degree of care required is measured by the extent of the peril to human life and limb which would be occasioned by neglect; and was therefore the highest which may reasonably be exercised in order to prevent those injuries which human foresight could avert. The

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plaintiff has the right to look to the defendants in the first instance for the discharge of this obligation assumed. And it is no answer to an action by a passenger against a carrier, that the negligence or trespass of a third party contributed to the injury. These propositions would be more manifest if this action had been brought in form upon the implied undertaking of the defendants; but the plaintiff may elect to sue in tort or contract, and the rule of duty is the same in either form of action. *Warren v. Fitchburg Railroad*, 8 Allen, 227. *Ingall v. Bills*, 9 Met. 1. *McElroy v. Nashua & Lowell Railroad*, 4 Cush. 400. *Sullivan v. Philadelphia, &c. Railroad*, 30 Penn. State R. 234.

Even if no privity of contract existed, and the injury was the result of the joint act of the defendants, the owner of the load of hay and the Eastern Railroad Company, it would furnish no defence to this action; for, in actions of this description, non-joinder of defendants cannot be availed of in bar. And this is true although the party contributing by his negligence was acting without concert with and entirely independently of the defendants. *Illidge v. Goodwin*, 5 C. & P. 190. The cases cited by the defendants, in opposition to these propositions, against towns for injuries occasioned by defects in highways are reconciled by the consideration that this liability of towns is wholly statutory; and, by the construction given to the statute, no action can be maintained unless the injury arises wholly from the defect. *Rowell v. Lowell*, 7 Gray, 100. *Kidder v. Dunstable*, Ib. 104. *Richards v. Enfield*, 13 Gray, 346. *Moore v. Abbot*, 32 Maine, 46.

The first, second and fourth prayers for instructions, exonerating the defendants if the negligence of other parties contributed to the injury, were therefore properly refused, unless the case is taken out of the scope of these principles by the provisions of St. 1851, c. 128, upon which the defendants rely. By this statute, certain railroad corporations, including the defendants and the Eastern Railroad Company, were authorized to enter upon and use a portion of the Essex Railroad in common. Numerous provisions are therein made regulating the manner of the use and the compensation to be paid. A superintendent



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is to be appointed by the companies, and the directors of all the corporations are to make such arrangements as are necessary for the joint management and repair of the road; and in case of disagreement, each of said companies is empowered to apply to the county commissioners, who shall act as arbitrators on all points of difference between them. By section 6 it is provided that "in case of any accident occurring upon that part of the Essex Railroad," "that company shall be held liable for the same by whose act, neglect or default it was occasioned; and if it shall occur in consequence of any defect in the road, the damage shall be borne by the three companies respectively, in the same proportion in which they are required to pay for repairs of the road."

It is contended that, as these provisions establish a tribunal, consisting of the directors of all the roads, for the settlement of the arrangements for the joint management, the defendants are not liable in any form for injuries to third persons from any want of safety in the management fixed upon. But the defendants cannot escape liability for injuries occasioned by arrangements with the other roads to which they assented, by which the safety of passengers was endangered. It was not the purpose of the statute to establish a tribunal to settle these arrangements, whose adjudications should be conclusive upon all persons upon the question of their propriety. The instructions of the presiding judge upon this point were carefully given, and were in no respect erroneous. All the provisions of this statute, including § 6, were intended, we think, to regulate the use of the road and define the liability of these corporations among themselves for injuries happening on the road so used in common. As to strangers and other parties not in privity of contract, the liability of each stands upon common law principles.

The third instruction asked for was fully covered by the instructions given. It was wholly for the jury under all the circumstances to say whether due care required the defendants' servants to remove the passengers from the car, and it was so left to them.

All the instructions not given were rightly refused, and those which were given were sufficiently favorable to the defendants.

*Judgment on the verdict.*

## JOHN PARSONS vs. LUTHER D. PETTINGELL &amp; others.

Under Gen. Sts. c. 24, § 5, one fireward has no more authority, acting alone, than any other person, to direct the destruction of a house to prevent the spreading of a conflagration, although it may be impossible for the other firewards, or the other officers named in the statute, to get to the place where the occasion for action upon the subject arises.

If, for the purpose of staying a conflagration, a building has been blown up without right, the jury in estimating the damages should consider the circumstances under which the building and its contents were situated, and their chance of being saved, even though the same were not actually on fire; and should determine their value with reference to the peril to which they were exposed.

TORT in the nature of trespass *quare clausum fregit*, to recover damages for the destruction of the plaintiff's dwelling-house and furniture.

At the trial in the superior court, before *Wilkinson, J.*, it appeared that on the morning of the 18th of February 1864, a great fire broke out in Gloucester, commencing on Front Street, and extending destroyed a great many buildings and a large amount of property; that the dwelling-house of the plaintiff was situated on said Front Street, and that in the progress of the fire the defendants applied to and exploded in said house a quantity of gunpowder, to demolish or remove the same. The defendant Pettingell was a fireward of the town of Gloucester and chief engineer of its fire department. The other defendant merely acted under the directions of said Pettingell.

Evidence was introduced on the part of the plaintiff tending to show that he heard the alarm of fire at about four o'clock in the morning; that he immediately commenced making preparations to remove his household goods, and was engaged in taking the same from his house, when, at about six o'clock, as he thought, he was notified that his house was to be blown up; that he thereupon left it, and soon afterwards the gunpowder was applied and exploded in his house; that the defendants thereby interrupted the plaintiff in removing his goods from his house, and destroyed the house and goods.

The defendants admitted that they exploded powder in the plaintiff's house, and that the fire commenced at the time and

place stated; and they put in evidence tending to prove that the fire spread, with a high wind, rapidly towards his house, burning up the buildings on both sides of the street on which it stood, and around and beyond it, and the plaintiff's among the rest; that in the progress of the fire and in order to stay the same in that direction, somewhere between seven and eight o'clock, and when the plaintiff's house was already thoroughly on fire, they removed or attempted to remove it by an explosion of gunpowder therein; that at the time this was done the said house was thoroughly on fire to such an extent that its destruction, together with its contents, from that cause had, in effect, already taken place; and that the fire did not stop there, but burned up buildings on all sides of it and all beyond it for a long distance.

The defendants also introduced evidence tending to show that there were seven firewards engaged at different points of the burning district; that the fire covered an area of nearly twenty-five acres in extent; that with the exception of one other fireward there was no other fireward or other civil officer in the immediate neighborhood of the plaintiff's house at the time when the defendant Pettingell ordered the powder to be applied; and that there was no time or opportunity for Pettingell to consult any other fireward or other officer.

The plaintiff introduced evidence, by way of rebuttal, tending to show that his house was not on fire at the time powder was applied by the defendants.

The defendants asked the judge to instruct the jury as follows :

"1. That if the plaintiff's house was not on fire, and Pettingell had no opportunity to meet and consult two other firewards or any of the other officers mentioned in the statute, he had the right, acting officially, if he deemed it advisable or necessary, to destroy it, and his honest judgment and decision in such case would be final.

"2. That if the destruction of the plaintiff's house by fire whether said house was at the time on fire or not, was inevitable, the defendant Pettingell, acting officially, had the right

if he deemed it necessary, to demolish the house, and his decision in such case would be final.

"3. That if the plaintiff's house was materially on fire, and Pettingell, acting officially, thought it necessary or advisable and decided to demolish it, his decision in such case would be final.

"4. That if the plaintiff's house was materially on fire, and Pettingell, acting officially, decided to destroy it, he had a right so to do, and in such case he would be entitled to be guided by his own judgment. Even if he erred in judgment and did not effectually destroy the building, or even made matters worse, still, if honestly done in the discharge of his official duty, he would not be responsible for damages, even if in so doing he interrupted the plaintiff in saving his more bulky and heavy movable property.

"5. That the defendants are liable for the destruction of such personal property of the plaintiff, if any, as might have been saved if they had not interfered, and for no more."

But the judge refused so to rule, and instructed the jury that, "inasmuch as the act of the defendants in blowing up the plaintiff's house was without his consent, and not directed by any three firewards or by any of the other persons named in Gen. Sts. c. 24, § 5, it was wrongful, and the plaintiff is entitled to such damages as he has sustained therefrom. If the fire had not reached the plaintiff's house at the time when it was destroyed by the defendants, so that it was not and had not been on fire, then the plaintiff is entitled to recover the value of the house and furniture in it, after deducting the amount of insurance received by the plaintiff on account of their loss. The fact that they were in imminent peril of destruction by fire would not diminish the damages to which the plaintiff was entitled. If the plaintiff's house at the time it was blown up was so far on fire as to render its destruction inevitable, or in other words if the fire upon the house had made such progress in its destruction as to render its extinguishment impossible, then to all practical purposes it had become of no value. It may be said to have been then destroyed, and the

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defendants' act was not injurious to the plaintiff, and he can recover no damages therefor. If the fire had caused some injury to the house of the plaintiff at the time the defendants blew it up, but had not proceeded to the extent supposed in the previous instruction, then such injury is to be deducted from the value, and the defendants are only liable for the difference. If the furniture remaining in the house at the time it was blown up was uninjured by fire, as was admitted by the defendants, then the plaintiff is entitled to recover its full value, without regard to any peril to which it was exposed.

The jury returned a verdict for the plaintiff, assessing damages for injury to both house and furniture; and the defendants alleged exceptions.

*P. W. Chandler & B. H. Smith* for the defendants. Pettingell had authority to act alone, if no other firewards or other officer were within such distance as to afford opportunity to consult with them. Gen. Sts. c. 24, § 4. *Frankfort v. County Commissioners*, 40 Maine, 389. *Varick v. Briggs*, 6 Paige, 330. *The Generous*, 2 Dods. 322. *Stradling v. Morgan*, Plowd. 205. *Reniger v. Fogossa*, Ib. 13. *New River Co. v. Graves*, 2 Vern. 431. And if the plaintiff's house was materially on fire, and certain to be destroyed, this fireward, acting officially, had the right to destroy it if in his judgment this was necessary to prevent the further spreading of the fire. *Taylor v. Plymouth*, 3 Met. 462. *Pentz v. Aetna Ins. Co.* 9 Paige, 568. *Mayor, &c. of New York v. Lord*, 17 Wend. 296. The same rule applies to the goods. If the defendants are liable, it is only for so much as might otherwise have been saved. Gen. Sts. c. 24, § 5 *Mayor, &c. of New York v. Lord*, 17 Wend. 296; *S. C.* 18 Wend. 135. *Stone v. Mayor, &c. of New York*, 25 Wend. 161.

*S. B. Ives, Jr.*, for the plaintiff. This action is for a trespass to real estate. The ground of defence is, that the defendant Pettingell, by virtue of his office as a fireward, had a right to destroy the plaintiff's property. There is no question in this case as to the right at common law of any citizen to destroy a building, in case of necessity. That right may well be

conceded. The Gen. Sts. c. 24, §§ 4, 5, do not give to one fireward any authority to destroy buildings, beyond what is vested by law in every citizen. *Ruggles v. Nantucket*, 11 Cush. 433, and cases cited.

The question as to damages is, what is the proper rule applicable to trespassers? Can they set up that if they had not destroyed the property, somebody else, or the elements, would have destroyed it? Trespassers, who have taken from a party the control of his property under circumstances like the present, cannot compel him to undertake to say what part of it he might otherwise have saved. He was entitled to every possible chance of saving his property. If nothing short of an almost miraculous interposition could have saved it from destruction, he was entitled to his chance of even that. In a suit against a town, upon their statute liability, it is held that no danger, however imminent, can be material. *Taylor v. Plymouth*, 8 Met. 462. Shall trespassers have a more lenient rule? The instructions asked for present an issue which it is impossible to try. Who can measure the speed of the approaching conflagration, or tell how many of the plaintiff's friends would have lent him their aid? Who can determine whether this mirror or that carpet would have been saved?

HOAR, J. A fireward is an officer who derives all his powers from the statute; and when the statute empowers three firewards to do certain acts upon their joint responsibility, acting together, it neither expressly nor by implication gives any such authority to one of them, acting alone. *Ruggles v. Nantucket*, 11 Cush. 433. In that case the court say that "the plain intent of the statute is, that no house or building shall be demolished, unless it shall be judged necessary by three firewards, or by the other officers authorized to act in their absence, or where no firewards have been appointed. . . . It is a joint authority expressly given to the officers designated, acting together, and cannot be exercised by a minority, or by any one of them."

The defendants seek to remove their case from the operation of this principle by showing that it was impossible to procure the concurrent action of three firewards, they being separated

by the fire; and contend that as the necessity for the destruction of the house was immediate and pressing, the one who was in a position to act must be regarded as entitled to act alone. But as one fireward is not intrusted by law with any peculiar authority over the subject, he would in such a case be no more than any other citizen; and the necessity would apply as well to the acts of any other person present as to his.

We think, therefore, that the ruling of the court was right, that "inasmuch as the act of the defendants in blowing up the plaintiff's house was without his consent, and not directed by any three firewards or by any of the other persons named in Gen. Sts. c. 24, § 5, it was wrongful, and the plaintiff is entitled to such damages as he had sustained therefrom." It is objected that this instruction did not leave open to the jury the question whether the destruction of the house was necessary for the public safety, which the defendants had a right to prove, and which would have furnished a justification. *Mulwerer v. Spinke*, Dyer, 36. *Mouse's case*, 12 Co. 63. *Saltpetre case*, 12 Co. 13. *Taylor v. Plymouth*, 8 Met. 462. But we must interpret the instruction given by the subject to which it was applied by the judge who gave it. And we think it is obvious that it only referred to the official authority under the statute upon which the defendants relied, and upon which they had asked for instructions which were refused. It does not appear from the bill of exceptions that any ruling was asked upon the common law right to pull down a building in case of necessity, or that the point was presented by the defendants to the court or jury. The extent and limitations of that right are not before us for discussion or decision.

But we are of opinion that the rule of damages was erroneously stated, and that upon this point the exceptions must be sustained. The jury were instructed that the fact that the house and furniture in it were in imminent peril of destruction by fire would not diminish the damages to which the plaintiff was entitled. This instruction was afterward qualified in its application to the building, by stating that if it was so far on fire at the time it was blown up as to make its destruction

inevitable, it might be considered as already destroyed, and the defendants would not be answerable; and that if it was partially burned, but not to such an extent, the amount of injury which it had received should be deducted from its value. But it was still held that unless the house or furniture was actually on fire at the time nothing was to be deducted from their full value on account of any peril to which they were exposed. This ruling would include the case of a building or furniture so surrounded by fire as to make their preservation, or even access to them for more than a moment, impossible, while they were yet not actually burning. The defendants asked that the jury should be instructed that they were "liable for the destruction of such personal property of the plaintiff, if any, as might have been saved if they had not interfered, and for no more." This was in substance the true rule. As the defendants were wrongdoers, it was necessary that such facts should appear as would limit their full responsibility. But such facts might be shown. It is obvious that in the midst of an extensive conflagration property might be so situated in relation to the fire, although not actually burning, as to materially affect its value. The plaintiff had a right to the chance of saving his property of which the act of the defendants deprived him. But that chance might be so small as to be of scarcely appreciable worth.

We think the jury should have been permitted to consider whether there was any possibility of saving the property destroyed, although it was not proved to have been on fire; and that they should not have assessed more than nominal damages for that which could not have been saved.

*Exceptions sustained*



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*Davidson v. Nichols & another.*

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**HERMAN E. DAVIDSON vs. JAMES R. NICHOLS & another.**

The sale of an article in itself harmless, and which becomes dangerous only by being used in combination with some other article, without any knowledge by the vendor that it is to be used in such combination, does not render him liable to an action by one who purchases the article from the original vendee, and who is injured while using it in dangerous combination with another article; although by mistake the article actually sold is different from that which is intended to be sold.

**TORT.** The declaration averred that "the defendants were wholesale chemists and druggists, and engaged in selecting, preparing, compounding and vending chemical substances, and held themselves out as possessed of competent skill and knowledge for the transacting of such business; that A. & D. D. Geyer of Gloucester, who were well known by the defendants to be retailing druggists, applied to the defendants for a well known chemical substance called black oxide of manganese, intending to purchase the same; but the defendants negligently and unskillfully furnished and sold to A. & D. D. Geyer, for and instead of the black oxide of manganese, a certain quantity of a chemical substance known as the sulphide of antimony, resembling black oxide of manganese in its external appearance, the said sulphide of antimony and black oxide of manganese being respectively crude substances obtained from the earth, and after being separated from foreign substances sold in their natural state as they are imported, and not compounded or prepared in any way after importation; and said defendants represented the same to be black oxide of manganese, and the said Geyers, relying upon the skill and judgment of the defendants, thereupon sold and delivered to the plaintiff the said sulphide of antimony without opening the package or examining the same, the said Geyers and the plaintiff both having been induced to believe by the conduct of the defendants, and actually believing, that the same was black oxide of manganese; that the plaintiff, still believing said substance to be the black oxide of manganese, proceeded to use the same in combination with chlorate of potassia, a substance with which said oxide might be safely and properly used, but from

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the combination of which with sulphide of antimony a dangerous explosion follows; that by reason of such use and combination, although care which would have been sufficient had the article been what it was described was used by him, a dangerous explosion was caused, and the plaintiff by such explosion was greatly injured in his person, to wit, in his head and sense of hearing, and in his property, to wit, in his dwelling-house, furniture, works of art and wearing apparel, and sustained great damage thereby; the same being wholly caused by the aforesaid negligent and careless act of said defendants in putting up, furnishing and sending into the market for sale said sulphide of antimony with the incorrect representation lawfully confided in by others that the same was the black oxide of manganese."

The defendants demurred to the declaration, and the demurrer was sustained in the superior court, and judgment rendered thereon for the defendants; and the plaintiff appealed to this court.

*S. B. Ives, Jr. & S. Lincoln, Jr.*, for the defendants.

*S. H. Phillips*, for the plaintiff. The case of *Thomas v. Winchester*, 2 Selden, 397, covers the principles relied on in this case. The facts stated in the declaration show a wrongful act of the defendants, in consequence of which the plaintiff was injured; and by well established principles the defendants are liable to the plaintiff therefor. This action is in tort, and in such cases a direct remedy is given to the injured party against the wrongdoer. See *Scott v. Shepherd*, 2 W. Bl. 892; *Vaughan v. Menlove* 3 Bing. N. C. 468; *Lynch v. Nurdin*, 1 Q. B. 29; *Dixon v. Bell*, 5 M. & S. 198; *Vandenburgh v. Truax*, 4 Denio, 464; *Illidge Goodwin*, 5 C. & P. 190. The wrongful act of the defendants in the present case was an act dangerous to the whole community, and in such case one who sustains a special injury may recover therefor. *Duncan v. Thwaites*, 3 B. & C. 556. And in all the cases acts of gross negligence, as well as acts positively unlawful, render the defendant liable. No privity of contract need be proved, because the action is not brought on a contract. It makes no difference whether the article sold under a false

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name was crude and sold by the defendants in the state in which it was received by them, or whether it was changed and prepared by them. The wrongful act consists in sending the article into the community under a false name, for the correctness of which the public and the plaintiff relied upon the skill and reputation of the defendants. See also *Farrant v. Barnes*, 11 C. B. (N. S.) 553; *Brass v. Maitland*, 6 El. & Bl. 470.

BIGELOW, C. J. The substance of the averments of the declaration in this action is, that the defendants, being druggists and chemists, sold and delivered to certain persons an article which the defendants supposed to be black oxide of manganese, but which was in fact sulphide of antimony; that this mistake arose from the negligence and want of skill of the defendants; that the person to whom the article was sold by the defendants, acting on the belief that it was the oxide of manganese, resold it to the plaintiff; that he, influenced by the same belief, mixed it with chlorate of potassia; and that thereby a dangerous and explosive substance was created, which exploded and caused great injury and damage to the person of the plaintiff and to his property. From these averments it appears that the plaintiff did not enter into any contract, directly or indirectly, with the defendants. The plaintiff obtained the article by a sub-sale from those to whom the defendants had previously sold it. There was therefore no privity between the plaintiff and the defendants. It is not alleged that the defendants were guilty of any false or fraudulent representations concerning the article sold by them. There is no averment that the article was of itself dangerous, but on the contrary the implication from the allegations is that it was harmless and innocuous, and only becomes explosive and dangerous by being compounded with chlorate of potassia; nor is it averred that the defendants had any knowledge that the article was bought of them to be resold to the plaintiff, or that they had any notice or information of the purpose for which it was to be used, or that it was intended to compound it with any other substance.

This statement of the facts averred in the declaration, and of the omission to insert therein other and additional allegations,

makes it clear that no valid cause of action against the defendants is set forth. Plainly there is no liability to the plaintiff *ex contractu*. Whenever a wrong or injury results from the breach of a contract merely, an action for redress, whether in form *ex contractu* or *ex delicto*, can be maintained only by a party to the contract. The obligation and duty arising out of a contract are due only to those with whom it is made. If the rule were otherwise and no privity of contract were required to sustain an action for a breach, there would be no limit to the liability which might be incurred by a contracting party. It would extend so as to give a right of action to all persons, however remote from any connection with the original parties to a contract, or however numerous they might be, who happened to sustain a loss or suffer an injury attributable to a breach of the stipulations into which a contracting party had entered. For example, the builder of a railway carriage, if an accident should happen through a defect in its construction occasioned by a breach of the agreement under which it was built, might be held liable to each passenger who sustained an injury in his person or property in consequence of such defect. So in every case the liability of a manufacturer or vendor of an article might be extended and multiplied indefinitely, if he could be held responsible to all persons who were able to trace back their losses or injuries to some carelessness or breach of duty towards the party with whom he had originally contracted to make or to sell the article. But the rules of law do not sanction a doctrine which leads to consequences so unreasonable and dangerous. Privity of contract is an essential element in the maintenance of an action founded on a breach of contract. When this does not exist, no action *ex contractu* can be sustained.

We think it equally clear that the plaintiff shows no cause of action *ex delicto* against the defendants. The insuperable difficulty is, that the averments in the declaration do not disclose any duty or obligation which rested on the defendants towards the plaintiff in the sale of the article to the persons from whom the plaintiff purchased it. As has been already stated, it was an innocuous substance, which became dangerous only when

used in composition with another chemical agent. It was not sold by them with any knowledge or understanding of the purpose for which it was intended to use it, nor did they know that it was to be resold to the plaintiff.

There being no duty imposed on the defendants towards the plaintiff arising out of any contract, this action is to be maintained, if at all, by showing a breach of some duty or obligation imposed on them by law. They have been guilty of no actionable carelessness or negligence unless it can be shown that they were bound to use some care or caution on which the plaintiff had a right to rely. Failing to show this, or to aver a state of facts from which the law would imply it, the gist of this action, which is founded on alleged neglect and want of due care, is wholly wanting. We know of no rule or principle of law by which a vendor of an article can be held liable for mistakes in the nature or quality of the article arising from his carelessness and negligence, which causes loss or injury to other persons than his immediate vendee, where there has been no fraudulent or false representations in the sale, and the article sold was in itself harmless; especially where the sale is made without any notice to the vendor that the article is bought for a third person, or that it is intended to be used in combination with other substances which may make it dangerous or injurious to persons or property. In such a case a vendor assumes no responsibility and incurs no liability beyond that which results from his contract with his vendee. With remote vendees of the article, who purchase it by sub-sales from those to whom it was originally sold, he enters into no contract, either express or implied, and takes on himself no obligation or duty whatever. Nor has he done any wrongful or illegal act towards third persons, for the consequences of which he is liable. The general principle applicable to this class of cases is, that a vendor takes on himself no duty or obligation other than that which results from his contract. For a breach of this, he is liable only to those with whom he contracted. All others are strangers. The law fastens on him no general or public duty arising out of his contract, for a breach of which he can be held liable to those not in privity with him.

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No case has been cited by the counsel for the plaintiff which contravenes these doctrines, or which lends any countenance to the support of the present action. In *Scott v. Shepherd*, 2 W. Bl. 892, and *Vaughan v. Menlove*, 3 Bing. N. C. 468, the defendants were guilty of unlawful or careless acts, the immediate and direct consequences of which were injurious to the plaintiffs. The same is true of *Lynch v. Nurdin*, 1 Q. B. 29; a case which to its full extent can hardly be supported. The ground of liability there was the careless act of the defendant in leaving his cart unattended in the street, by which a young child who climbed into it was injured. So in *Dixon v. Bell*, 5 M. & S. 198, the defendant was guilty of negligence in intrusting a loaded gun to a young child incompetent to take care of it, in whose hands it was discharged, and the child of the plaintiff was shot. It was there held that the injury was the direct result of the defendant's carelessness. *Illidge v. Goodwin*, 5 C. & P. 190, and *Vandenburgh v. Truax*, 4 Denio, 464, were decided on the same ground. No one of these cases arose out of a mistake or carelessness in the performance of a contract, or in the sale and delivery of goods, whereby injury was sustained by persons other than the parties to the contract and sale. They are founded on acts which were either unlawful or careless, from which immediate injury was caused to the plaintiffs. The cases most nearly resembling the present action are *Langridge v. Levy*, 2 M. & W. 519, and *Thomas v. Winchester*, 2 Selden, 397. But they are clearly distinguishable. In *Langridge v. Levy* the defendant was held liable on the ground that he sold an article of a dangerous character under false and fraudulent representations, with a knowledge that it was to be used by the plaintiff. There a distinct fraud was committed on the plaintiff, in consequence of which the injury happened. In *Thomas v. Winchester* the defendant had put up in a bottle a deadly poison to which he had affixed a label describing it as a harmless medicine, and had sent it into the market for sale. That case was put on the ground that the article itself was dangerous to human life; that sending it into the market with a description or name by which persons would be deceived and led to suppose that it was

harmless, was an act of criminal carelessness, and that the label operated as a continuous representation that the article was such as thereby named and described, and that the defendant was therefore immediately responsible for the injury to the plaintiffs. So the case at bar is distinguishable from actions brought against persons acting as surgeons or apothecaries for injuries inflicted on patients under their care. In such cases, although the contract of employment may not be made with the person injured, nevertheless the patient suffers directly and immediately from the acts of the party who treats him carelessly or unskillfully.

The views which we have taken of the rights of the parties to this action are supported by the decisions in *Winterbottom v Wright*, 10 M. & W. 109, and *Longmeid v. Holliday*, 6 Exch 761. See also Broom on Parties, 246, *et seq.*

*Demurrer sustained; judgment for the defendants.*



JOHN J. MANNING vs. JOSEPH ALBEE.

False and fraudulent representations that a particular kind of security, which is worthless, is selling in the market at a given price, accompanied by the exhibition of a newspaper containing false quotations thereof, will entitle a purchaser to rescind his contract.

An owner of goods who has been induced by fraud to sell them and accept a note on time with worthless securities therefor may replevy the same without returning the note and securities, if the purchaser cannot be found; and the action will not be defeated by his afterwards demanding payment of the note, at its maturity.

REPLEVIN of a quantity of clothing.

At the trial in the superior court, before *Morton, J.*, the plaintiff's counsel in his opening to the jury stated the following facts: In June 1864 the plaintiff, being the owner of a stock of clothing worth \$1280 in his shop in Rockport, advertised the same for sale, and soon afterwards one French, a stranger to the plaintiff, came to Rockport and proposed to buy them, and agreed to take them for cash upon a fair appraisement. A few days thereafter French came again, with the defendant, who

came nominally to appraise the goods, and who was also a stranger to the plaintiff. French then stated that he had invested his money in bonds and could not pay cash, but was provided with security, and produced two bonds of the Pittsburgh, Maysville and Cincinnati Railroad, for \$1000 each, which French and the defendant said were perfectly good, and worth eighty-two cents on the dollar, and were selling in the market for from eighty-two to eighty-five cents on the dollar, and rising. French at the same time, by the defendant's request, showed to the plaintiff a newspaper which purported to contain a quotation of stock sales, in which the bonds were quoted as sold at eighty-two cents. French requested the plaintiff not to put these bonds on the market, as they were rising in value every day, and he should redeem them; he also contracted with the plaintiff for a lease of his store for a year, in order to retail the goods. Relying on these representations the plaintiff sold the goods and took French's note with the bonds as collateral. French hired a young man to take charge of the goods and left Rockport and has not since been seen or heard of by the plaintiff. A few days afterwards the defendant took possession of the goods and store, claiming to have bought the goods of French, and commenced selling them at auction, and sent away a portion of them. The plaintiff therefore made inquiries and found that his securities were worthless, and that there had been no sales of them as represented to him. He thereupon brought this action, claiming that the defendant took the goods with full knowledge of the fraud, and conspired with French thus to obtain them. The note of French was not due when the action was commenced, and was placed in a bank for collection, and payment thereof was demanded, but in vain. French could not be found, and no tender of the note or bonds was made to him or Albee.

The judge ruled upon this opening that the action could not be maintained, and a verdict was accordingly returned for the defendant; and the plaintiff alleged exceptions.

*W. C. Endicott & B. H. Smith*, for the plaintiff, besides cases cited in the opinion, cited *Martin v. Roberts*, 5 Cush. 126



*Irving v. Thomas*, 18 Maine, 418; *Lysney v. Selby*, 2 Ld. Raym. 1118; *Dobell v. Stevens*, 3 B. & C. 623; *Allison v. Matthieu*, 2 Johns. 235.

*S. B. Ives, Jr.*, for the defendant, besides cases cited in the opinion, cited *Harvey v. Young*, Yelv. (Amer. ed.) 21; *Salem Rubber Co. v. Adams*, 23 Pick. 256; *Pratt v. Philbrook*, 33 Maine, 17; *Thayer v. Turner*, 8 Met. 550; *Perley v. Balch*, 23 Pick. 286; *Whitwell v. Vincent*, 4 Pick. 449.

GRAY, J. This court has repeatedly recognized and acted upon the rule of the common law, by which the mere statements of a vendor, either of real or personal property, not being in the form of a warranty, as to its value, or the price which he has given or been offered for it, are assumed to be so commonly made by those holding property for sale, in order to enhance its price, that any purchaser who confides in them is considered as too careless of his own interests to be entitled to relief, even if the statements are false and intended to deceive. *Medbury v. Watson*, 6 Met. 259, 260. *Brown v. Castles*, 11 Cush. 350. *Veasey v. Doton*, 3 Allen, 381. *Hemmer v. Cooper*, 8 Allen, 334. But the utmost limit of this rule has been reached in applying it to statements of the price paid by the person making them; and in the leading case in this commonwealth of *Medbury v. Watson*, an action was maintained for false and fraudulent representations as to the price paid by a third person for the property in question. See also *Sandford v. Handy*, 23 Wend. 269.

In the case now before us, the plaintiff offered to show that he was induced to part with his goods by the false and fraudulent representations of French and the defendant, not only as to the value of the bonds offered by French to secure the note given by him for the goods, but also as to the sales of such bonds in the market at a certain price, appearing by a published list of sales of stocks and securities, which they exhibited to him, to have actually taken place. This last representation was one which the plaintiff is not shown to have had equal means of knowing the truth or untruth of, and on which he might, without imputation of negligence, rely, and upon discovering it to be false and fraudulent, maintain an action.

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The demand of payment of the note after the bringing of this action did not abate or defeat it. The plaintiff was not obliged to surrender the note and bonds before beginning a suit for the fraudulent representations; for the bill of exceptions states that French, from whom he received them, could not be found, so that they could be tendered to him; and the defendant was in no event entitled to them. *Stevens v. Austin*, 1 Met. 558. Even in a similar action against French, it would be sufficient to file them at any time before final judgment. *Thurston v. Blanchard*, 22 Pick. 18. *Bridge v. Batchelder*, 9 Allen, 394. *Exceptions sustained.*

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#### HERMAN E. DAVIDSON vs. THOMAS A. DELANO.

If the answer, in an action upon a promissory note, dated more than six years before the commencement of the action, simply sets up the statute of limitations, and it is in issue whether payments have been made within six years, the defendant cannot be allowed, in corroboration of his own testimony that no such payments have been made, to prove that the note was without consideration.

In an action by an indorsee against the maker of a promissory note, the mere fact of indorsements of payments within six years, made in the handwriting of the payee, is not competent evidence to prove such payments.

CONTRACT upon a promissory note for \$2600, dated April 1st 1845, signed by the defendant, payable to the order of D. F. Davidson, and by him indorsed to the plaintiff. The writ was dated October 31st 1863. The answer simply set up the statute of limitations.

At the trial in the superior court, before *Putnam, J.*, the note was introduced in evidence, and bore indorsements of a payment of two hundred and fifty dollars on the 2d of March 1850, and one of thirty-two dollars on the 26th of July 1853. The plaintiff also introduced the deposition of the payee of the note, which tended to prove the payments which were indorsed thereon by himself, and also that the defendant had lived in the state of New York since 1855 or 1856. The deposition of the defendant was introduced in defence, in which he denied the payments;

and, in reply to the third interrogatory, he stated that the note was given without any consideration. The plaintiff objected to the competency of this answer, but the judge admitted it simply for the jury to consider in determining the question whether or not the payments had been made.

The plaintiff's counsel argued to the jury that the indorsements in the handwriting of the payee were corroborative of his testimony; but the judge instructed them that the indorsements did not of themselves furnish any competent evidence, except so far as they were proved to have been made with the knowledge of the defendant; and that the plaintiff must satisfy them of the payments by other evidence.

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

*B. H. Smith*, for the plaintiff.

*S. B. Ives, Jr.*, for the defendant.

DEWEY, J. 1. It is conceded that the defendant could not under his answer have set up, in avoidance of the action, the want of consideration of the note; but he insists that such fact may be shown, as corroborative testimony in aid of his evidence denying the fact of any partial payments having been made on the note, which would take the case out of the statute of limitations.

But we think that, under the sole plea of the statute of limitations, it must be taken, under Gen. Sts., c. 129, §§ 17, 27, for the purposes of the trial, as an admitted fact, that the note was, as set forth in the copy annexed to the declaration, given for a valuable consideration, and the plaintiff may properly assume that this is not to be questioned at the trial.

If this be not so, the whole range of defences arising from alleged frauds in obtaining the note, and from full payment, &c., are all equally open to the party in aid of his evidence upon the plea of the statute of limitations. Thus the defendant might indirectly avail himself of substantial grounds of defence without having raised them in his answer, or given to the other party a reasonable opportunity to prepare to meet them.

It seems to us, therefore, that under the naked plea or answer

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of the statute of limitations it is incompetent for the defendant, in aid of his other evidence to sustain such a plea, to introduce evidence impeaching the consideration of the promissory note declared upon, and that for all the purposes of the trial a sufficient consideration must be taken to be admitted. Upon this point the exceptions are sustained.

2. The ruling of the court as to the effect to be given to the indorsements on the note in the handwriting of the payee was correct. *Waterman v. Burbank*, 8 Met. 354.

*Exceptions sustained.*

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CHARLES E. GOSS vs. ABIGAIL AUSTIN.

The death of one of two joint defendants in an action of contract will not prevent the plaintiff from testifying in his own favor against the survivor.

Illegality of a contract which is the subject of an action cannot be relied on in defence, unless it appears by the declaration or is specially pleaded in the answer.

CONTRACT, originally brought against Samuel Austin, who died after the commencement of the action, and the present defendant. The declaration was simply upon an account annexed, which contained numerous items for the hire of horses and carriages, fares, hotel bills, and one item of \$135 "for services in procuring the discharge of one Hanchett from custody, and his return again to his regiment."

The answer, after making general denials, averred that the plaintiff falsely represented himself to be a provost marshal, acting under authority of the United States, and having a warrant for the arrest of George B. Hanchett for desertion from the military service of the United States, and illegally arrested said Hanchett, who was a nephew of the defendants; and thereafter, by divers false representations, which were given in detail, endeavored to excite their fears and sympathies for Hanchett's safety, and said Abigail, acting under the fears and sympathies so excited, told the plaintiff that she was willing to do anything

to save Hanchett's life ; and any promise made by either defendant was obtained by fraud.

At the trial in the superior court, before *Morton, J.*, the plaintiff was allowed, against the defendant's objection, to testify to the joint promise made by the two original defendants.

The plaintiff also testified that, claiming to act under a warrant from the regiment, and also as a special provost marshal, he arrested Hanchett as a deserter, and delivered him to the custody of the military commandant at Boston, and afterwards, in pursuance of his agreement with the two original defendants, he incurred the expenses and rendered the services sued for. Upon the evidence of the plaintiff, the defendant contended that the contract, if any, between the plaintiff and defendant, was against the policy of the law ; but the judge ruled that this defence was not open under the answer.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

*D. Saunders, Jr.*, for the defendant. It was the duty of the plaintiff, acting as provost marshal, to return Hanchett to the proper military authorities. As such officer, he could not undertake for compensation to avert from him the punishment due to his offence. *Norman v. Cole*, 3 Esp. 253. *Hatzfield v. Gulden*, 7 Watts, 152. *Satterlee v. Jones*, 3 Duer R. 102. *Dixon v. Olmstead*, 9 Verm. 310. *Denny v. Lincoln*, 5 Mass. 385. *Odieneal v. Barry*, 24 Mississippi, 9. *Kribben v. Haycraft*, 26 Missouri, 396. This ground of defence was open under the pleadings.

*S. B. Ives, Jr. & J. B. Lord*, for the plaintiff.

*BIGELOW, C. J.* The question of the competency of the plaintiff to testify was settled in *Hayward v. French*, 12 Gray, 459. The death of one of several joint contractors who are defendants does not bring the case within the exceptions to the statute, so as to render the other party incompetent. It is only the death of a sole party to a contract or cause of action in issue and on trial, or, where several joint promisors are sued, the death of all of them, that operates to exclude the other party from testifying in his own favor.

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 Storer v. McGaw.
 

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The question of the illegality of the contract was not open to the defendant under the answer. No such ground of defence was set forth therein. Under the provisions of the practice act, any ground of defence not comprehended in a denial of the averments in the declaration must be pleaded in the answer. There is nothing in the declaration to indicate that the plaintiff's claim was illegal or contrary to public policy. The averments in the answer set out that the plaintiff was not a public officer, but falsely pretended to be one, and thereby deceived and defrauded the defendants — a ground of defence entirely inconsistent with the allegation which the defendant sought to establish at the trial, that he was in fact clothed with official authority, and that the services he undertook to perform for the defendants were inconsistent with his public duties, and so contrary to public policy, and illegal. No such averment is contained in the answer, and the evidence offered in support of it was rightly rejected. *Granger v. Ilsey*, 2 Gray, 521. *Bradford v. Tinkham*, 6 Gray, 494. *Exceptions overruled.*

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### JAMES A. STORER vs. LIZZIE E. MCGAW.

If on a plea of tender in a police court the money is not actually put into the custody of the court, but is brought in by the defendant and offered to and until the rendition of judgment always kept ready for the plaintiff, who refuses to take it, putting his refusal on the sole ground that he claims more, and after judgment for the plaintiff the defendant appeals and pleads the same tender in the superior court, and pays the money to the clerk, it is too late for the plaintiff to object to the defendant's irregularity, in omitting to put the money into the custody of the police court.

CONTRACT upon an account annexed, commenced in the police court of Lawrence and brought by appeal to the superior court, where judgment was rendered for the defendant, upon facts which are stated in the opinion. The plaintiff alleged exceptions.

*S. B. Ives, Jr.*, for the plaintiff, cited *Clafin v. Hawes*, 8 Mass. 261, *Carley v. Vance*, 17 Mass. 389; *Le Grew v. Cooke*, 1 B. & P. 332; *Cox v. Robinson*, 2 Stra. 1027; *Stevenson v. Yorke*, 4 T. R. 10.

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*E. J. Sherman*, for the defendant, cited *Sheriden v. Smith*, 2 Hill, 538; *Earle v. Earle*, 1 Harrison, (N. J.) 273; *Cullen v. Green*, 5 Harring. (Del.) 17; *Knox v. Light*, 12 Illinois, 86; *Freeman v. Fleming*, 5 Iowa, 460; *Seibert v. Kline*, 1 Penn. State R. 38; *Keys v. Roder*, 1 Head, (Tenn.) 19; *Warren v. Nichols*, 6 Met. 261; 1 Tidd Pr. 622.

COLT, J. The defendant in her answer in the police court properly pleaded a tender of the amount due the plaintiff, alleging a *profert in curia*. It appears that the amount tendered was not actually placed in the custody of the court, but at the trial when the answer was filed she produced the money and offered it in open court to the plaintiff, and was there ready to pay the same until the judgment was rendered. The plaintiff refused to accept the amount so tendered and produced in court, making no other objection than that he was entitled to recover a larger sum. The judgment of the police court being for the plaintiff, the defendant appealed to the superior court, and upon the entry of her appeal at December term 1864 the amount of the tender was paid to the clerk under the rule, and an answer filed, in which the tender was pleaded with *profert*. No other pleadings were filed in the case, and it was continued to March term 1865, when at the trial the plaintiff asked the court to rule that the plea of tender was bad, because the defendant "had not made *profert in curia* of the money in said court." The judge refused the request, and the plaintiff alleged exceptions.

A plea of tender must be accompanied with a *profert in curia*, and the omission of the *profert* in the plea was held, in *Carley v. Vance*, 17 Mass. 389, cited by the plaintiff, to be good ground of demurrer. There was no such omission in this case. The *profert* was properly pleaded. The objection is, that in fact it was not complied with by placing the money in the actual custody of the court. Assuming that this neglect on the part of the defendant was sufficient to avoid the plea, if the objection had been seasonably taken, and that in justices' and police courts the money must be placed in the hands of the clerk, or if there is no clerk, in the keeping of the magistrate, the inquiry remains whether the plaintiff has exercised proper diligence, and

has so conducted as not to have waived the advantage of which he might at the proper time have availed himself.

The failure to pay money into court under a plea of tender is not a traversable part of the plea, to be tried as a question of fact to the jury. It is an irregularity of practice. In *Sheriden v. Smith*, 2 Hill, 538, Nelson, C. J., says: "It is a point of practice to be dealt with summarily, like all questions of that kind. The omission to pay in the money was but an irregularity, which the plaintiff waived by accepting a plea, and taking issue upon it."

The principle that the effect of an error is obviated by the acquiescence of the party who might take advantage of it is extensively applied in all branches of our jurisprudence, and in none more frequently and usefully than in matters of pleading and practice. It is unnecessary to cite many authorities from our reports. One of the latest will suffice. By *St.* 1852, *c.* 312, § 9, it was enacted that if no declaration should be inserted in the writ, and none filed in the clerk's office on or before the day when the writ is returnable, such omission should be a discontinuance of the action. In *Clark v. Montague*, 1 Gray, 446, the defendant, after the action had been several terms in court, moved to dismiss it because this statute had not been complied with, alleging that he then first knew of the omission. But Merriek, J. said: "Parties are not required to insist upon every privilege which is given, or every right which is secured to them. It is a general rule that at their pleasure all irregularities and defects may be waived. This has very often been held, in many cases, and under a great variety of circumstances. Imperfect service, informality in a writ, an erroneous teste, not conforming to the direction on that subject in the constitution, the want of a seal required by law, are instances of irregularities which may be waived. . . . Nor is it necessary that a waiver should be shown by any direct declaration or entry upon the record; but it may be inferred or deduced from the course of proceeding or conduct of a party."

We can see no reason why this principle should not be applied to the present case. The payment into court is a requirement



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for the plaintiff's benefit. He certainly may waive it. In this case he expressly refused to accept it, because he claimed more and made no objection at the police court to the retention of the money by the defendant. No injury or delay accrued to him. He made no application for the money. And on the entry of the appeal payment was properly made to the clerk of the superior court. If he intended to rely on this omission, it was his duty to bring the matter to the attention of the court or of the defendant at an early stage of the case, when she might have been able to save the cost and expense of the continuance and trial, or might have remedied the error, in part at least, by an offer to be defaulted under the statute, or on payment into court under the common rule. By the plaintiff's silence she has lost these privileges, if now the tender is held invalid. The case presented is not like the case cited by the plaintiff of *Clafin v. Hawes*, 8 Mass. 261. The plaintiff in that case called for the money tendered, and it appeared that it had never been brought into court; and a motion for judgment for the plaintiff, *non obstante veredicto*, was granted.

We think this is to be classed with those cases in which errors and irregularities in the proceedings have been held cured by failure to object until cost and expense have accrued which would have been wholly or partly saved by timely notice to the party in fault.

*Exceptions overruled.*



### GEORGE HIGGINSON & others vs. INHABITANTS OF NAHANT & others.

The selectmen of a town have authority to lay out a town way wholly upon land of citizens, against their consent, entering their land from a highway and returning to it at about the same place where it enters, and leading to no other way or landing-place, and capable of being used for no purposes of business or duty, or of access to the land of any other person; and which is laid out with the design to provide access not for the town merely, but for the public, to points or places in the lands of those citizens, esteemed as pleasing natural scenery.

The selectmen of a town may estimate the damages caused to the owner of land by the laying out of a town way at the same meeting at which the way is located.

**BILL IN EQUITY** against the inhabitants of Nahant and the selectmen thereof, to restrain them from constructing a way which had been laid out by the selectmen.

At the hearing in this court, before *Gray, J.*, the plaintiffs offered to show that the way as located is wholly upon their lands and is bounded upon their lands on all sides except where it enters the same, that it leads to no other road or way or landing-place, public or private, and can be used for none of the purposes of business or duty, or of access to the land of any other person, but was laid out with a design to provide access, not for the town merely, but for the public, to points or places in the lands of the plaintiffs esteemed by the selectmen and those who applied to them to lay out the way, as pleasing natural scenery. This evidence was excluded.

The selectmen gave notice to the plaintiffs of the presentment to them of the petition for the laying out of the way, and of their intention to lay out the way, on a day and at a place named, when and where the plaintiffs were notified to be present, to show cause why the prayer of the petition should not be granted and the way be laid out. The plaintiffs appeared and, not asking to be then heard on the assessment of damages, or for any adjournment of the hearing, requested that they might be heard on that question after the selectmen should have fixed the line and boundaries of the way, in case they should lay out the same. The selectmen announced that then was the proper time for any hearing upon the question of damages; but this was not heard by the plaintiffs. The selectmen proceeded at the same meeting, after the close of the hearing and the departure of all parties, to lay out the way and assess damages.

The case was reserved for the determination of the whole court.

*S. Bartlett* and *H. W. Paine*, (*F. O. Prince* with them,) for the plaintiffs. The selectmen have no authority to lay out a way simply for pleasure. The property of individuals can only be appropriated to public uses when the public exigencies require it. Dec. of Rights, art. 10. So far as the legislation of the Commonwealth is concerned, there is nothing in its history which

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even remotely suggests the thought that either highways or town ways are to be laid out for mere purposes of pleasure. And the settled course of decisions, which forbid expenditures by towns for merely patriotic purposes, shows that the powers of towns are generally restricted to what is necessary, as they are specially by *St.* 1785, c. 75, in the matter of town ways. See *Tush v. Adams*, 10 Cush. 252. *Walker v. Swasey*, 4 Allen, 527. An analogous question has been raised and the right to exercise the power denied in *Woodstock v. Gallup*, 28 Verm., 587. See also *Blodgett v. Boston*, 8 Allen, 237. The owners of property which is to be taxed for the construction of the way are also interested in this question. By what tenure is their property held, if it is liable to be taxed for laying out ways for the pleasure of the public at large? Where is the limit to the power to please the public? Is a man's estate to be taken away, as fast as objects of interest grow into being by the development of the surface or the bowels of the earth? How old shall such an object be? And is there any distinction between natural and artificial objects? If a man builds a Fonthill Abbey or a Chatsworth, may towns lay out a public way through his grounds to reach it? It is a power which ought not to be committed to the selectmen of towns, confirmed by a town-meeting, to determine what are objects so interesting and curious as to warrant the taking away or incumbering of the property of the citizen for the public advantage.

Notice should be given, before determining the damages. See *Gen. Sts.*, c. 43, §§ 5, 6, 13, 14, 62; *Commonwealth v. Weiher*, 3 Met. 445; *Chase v. Hathaway*, 14 Mass. 222. [The argument as to the form of remedy is omitted.]

*W. C. Endicott*, for the defendants. The question of the necessity and convenience of a town way is exclusively for the selectmen and the town. *Monterey v. County Commissioners*, 7 Cush. 394. *Cragie v. Mellen*, 6 Mass. 7-15. *Walker v. Devereaux*, 4 Paige, 229, 250. *Champlin v. Mayor, &c. of New York*, 3 Paige, 573. *The King v. Mayor, &c. of London*, 3 B. & Ad., 271. A jury cannot revise their decision on this question. *Gen. Sts.* c. 43, §§ 20, 73. But the plaintiffs may, by

proper proceedings, obtain the judgment of the county commissioners. Gen. Sts. c. 43, § 70. What is public convenience or necessity is different in different places and at different times. It varies with the wants, location, condition, and pursuits of different communities. It is one thing in cities, and another in towns. The local tribunals are best able to determine what it requires, and with them the law places the decision. It is not for selectmen to inquire into the purpose of those who use a way, provided they travel on it. It is immaterial whether they are to pass over it for business or pleasure. But if there is a great amount of travel to any natural object of interest, the selectmen may legally lay out a way to reach it, if they find that a necessity arises.

The notice was sufficient. Gen. Sts. c. 43, §§ 3-7, 61-64. *Brown v. County Commissioners*, 11 Met. 210. *Inhabitants of New Salem, petitioners*, 6 Pick. 470. *Jones v. Andover*, 9 Pick. 146.

HOAR, J. There are three principal questions presented for adjudication upon this report; the first two requiring a decision of the rights of the plaintiffs, and the third concerning only the remedy.

The first and most important of these is whether, when a town way has been laid out by the selectmen of a town with all the forms prescribed by the statutes of the Commonwealth, and has been duly accepted by the town, it is competent, in order to impeach the validity of these proceedings, to show that the way is wholly on the land of the plaintiffs; that it enters their land from a highway and returns to it at about the same place where it enters; that it leads to no other way or landing-place, and can be used for no purposes of business or duty, or of access to the lands of any other person; but that it was laid out by the selectmen with the design to provide access, not for the town merely, but for the public, to points or places in the lands of the plaintiffs, esteemed by the selectmen, and those who applied to them to lay out the way, as pleasing natural scenery. It is certainly no objection to a town way that it will be serviceable not only to the inhabitants of the town, but also to the public generally.

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Though it is laid out by the officers and constructed and paid for by the inhabitants of the town, all persons have an equal right to use it after it is completed. *Cragie v. Mellen*, 6 Mass. 7. *Monterey v. County Commissioners*, 7 Cush. 394.

But the position of the plaintiffs is, that in the case presented the way is not intended for the legitimate purposes of a way; that the pretence of laying it out as such is merely colorable; and that private property cannot be lawfully taken and appropriated to such a use.

It has been held that, in laying out a town way, a formal adjudication that the public convenience and necessity require it is not made essential to its legality. *Jones v. Andover*, 9 Pick. 154. The reason of this seems to be that the inhabitants of the town, who constitute the public for whose use and advantage the way is principally designed, and who are to bear the expense of constructing it, are to decide by their vote whether it shall be established. The particular community whose convenience is to be consulted determine the matter for themselves. That the town want the road is best settled by the town's voting to have it and pay for it.

But yet the statutes authorizing the laying out of town ways undoubtedly imply the exercise of an independent judgment by the selectmen that the way is needed. A way laid out by them in pursuance of instructions by the town is not warranted by law. *Kean v. Stetson*, 5 Pick. 492. *State v. Newmarket*, 20 N. H. 519. And the purpose for which the way is laid out may be inquired into, in order to show that it was illegal. Thus it has been decided in New Hampshire that where the object of a town way was merely to avoid a toll-gate upon a turnpike it could not lawfully be made, the reason being that it was an invasion of an existing franchise. *Turnpike Co. v. Champney*, 2 N. H. 199. And see *West Boston Bridge v. County Commissioners*, 10 Pick. 270. And in *Woodstock v. Gallup*, 28 Verm., 587, it was said by the court that, while ornament and the improvement of the grounds about a public building might well be taken into consideration and regarded in connection with the convenience and necessity of a proposed highway, they do not alone constitute

a sufficient basis for establishing it. The doctrine that public ways are for travel, and not for places of amusement, has also been recognized in this commonwealth. *Blodgett v. Boston*, 8 Allen, 237.

But we are not aware of any case in which it has been ever held that, where there is an amount of travel sufficient to warrant the construction of a road which permanently seeks a particular avenue, the purpose for which the public want to travel is to be regarded, if the purpose is lawful. The plaintiffs have contended that the purpose for which a road is wanted must be a purpose of business or duty, in order to create a public exigency. But we think it impossible to go into such refinements. Nahant itself is a town which owes much of its population to its attractiveness for other purposes than business or profit. The passing from place to place is a rightful object of public provision in itself; and the occasions for it are as extensive as the pursuits of life. Pleasure travel may be accommodated as well as business travel. The security against an unreasonable invasion of private rights of property in establishing town ways unnecessarily is to be found, first, in the sense of justice and duty of the board of selectmen; secondly, in the improbability that the inhabitants of a town, with full opportunity for discussion and remonstrance, will vote to accept and construct a way which is not needed, and impose upon themselves the burden of constructing and maintaining it, as well as the damages to the land-owners whose property is taken; and, thirdly, in the power to apply to the county commissioners for the discontinuance of the way, if the town refuse to discontinue it. But selectmen may lay out and towns may establish such ways as they think necessary for any of the lawful purposes of travel. In *Blodgett v. Boston*, before cited, the Chief Justice uses this language in reference to the obligation of a town to keep a way in repair: "The word 'travellers' may well embrace within its meaning, as applied to the subject matter every one, whatever may be his age or condition, who has occasion to pass over the highway for any purpose of business, convenience or pleasure. Nor is the motive or object with which a street or way is thus used, if it be not

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unlawful, at all material in determining whether a person is entitled to an indemnity from a city or town for an injury occasioned by a defect. The highway is to be kept safe and convenient for all persons having occasion to pass over it, while engaged in any of the pursuits or duties of life." And it would seem that roads may be established for the purposes for which they are afterward to be kept in repair. We think, therefore, that the only true test is whether a road is wanted for public travel; which, in the case of town ways, is to be decided by the inhabitants of the town; and that we cannot go into a consideration of the reasons which may induce people to wish to travel upon it, if the travel is for an innocent and lawful purpose.

If the doctrine for which the plaintiffs contend were supported, a road to the top of Mount Washington, to Niagara or Trenton Falls, to the Mammoth Cave of Kentucky, or the Natural Bridge in Virginia, or even to a public park or common in the cities, would not come within the powers of the officers intrusted with the duty of laying out ways. It would also follow that the legislature would not have the constitutional right to take private property for a public park or pleasure ground, making full compensation to the owner—a conclusion which we should hesitate to arrive at without much farther consideration, in view of the important relations which air, exercise and recreation bear to the general health and welfare of the community.

Nor is it to be forgotten that, while sufficient public ways are a protection against trespasses upon private property, there may be some reason to expect that a way furnishing access to "pleasing natural scenery" will lead to settlement and habitation, and that, in the plan of a town, it may be well to make some prospective provision for probable future wants of the inhabitants in this respect.

The second objection to the validity of the proceedings is on account of the alleged want of notice to the plaintiffs after the selectmen had proceeded to lay out the way, and before the assessment of damages. They contend that after the way had been laid out, and its width, grade and exact location had been determined, they were entitled to a new notice of a hearing on

the question of damages. The argument is mainly founded upon the language of Gen. Sts. c. 43, § 62, which provide that the damages occasioned by the laying out of a town way shall be assessed by the selectmen "in the manner provided for the assessment and award of damages by county commissioners in laying out highways." We think this phraseology has reference to the nature of the damages, the deductions to be made for benefits, and the distribution of damages among different parties in interest. But giving it the fullest meaning of which it is capable, it would not support the claim of the plaintiffs. In laying out highways, there are, it is true, two meetings of the commissioners required by law; and parties interested are to be notified of each of them. But the first meeting is for the purpose of deciding upon the convenience and necessity of the way prayed for between the *termini* named in the petition. When this is determined, another meeting is to be held for the purpose of making the location, of which due notice must be given. Gen. Sts. c. 43, § 6. At this meeting the precise location of the way, its grade, width, &c., are first conclusively established, and the damages occasioned by its location are estimated and awarded. The land-owners whose property is taken or injured have precisely the same difficulty as in the case at bar. They must prove their damages at the same meeting at which they learn for the first time exactly how the way will affect them.

The first meeting, to decide upon the convenience and necessity of the proposed way, is not required in the case of town ways, but remains to be settled by the vote of the town. In other respects the owners of property stand exactly as they do in the case of highways.

The rights of the plaintiffs not appearing to have been infringed in any particular, it becomes unnecessary to consider the question which has been argued relating to the form of remedy, and the bill must be

*Dismissed with costs.*



## ANDREW J. PERKINS vs. ABEL RICHARDSON.

Land owned by a married woman in her own right might be conveyed, prior to 1855, in this commonwealth, by a deed in which she joined with her husband in the granting part thereof, although her husband alone made the covenants contained therein, and the last clause of which stated that she executed the same "in relinquishment of dower."

An office copy of a lost deed is competent secondary evidence thereof, in favor of the grantee, although the deed was executed by a husband and wife, to convey land owned by her in her own right, prior to 1855, and acknowledged by the husband alone.

BILL IN EQUITY by a second mortgagee to redeem land from the first mortgagee thereof.

At the hearing, before *Gray, J.*, the execution and validity of the second mortgage were disputed; and the plaintiff, after proving the loss of his original mortgage, offered in evidence an office copy thereof, which commenced thus: "Know all men by these presents that I, Albert Abbott and Elizabeth his wife, in her right, of Lawrence," "in consideration of one thousand dollars paid by Andrew J. Perkins of Lawrence," "the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said Perkins a certain piece of land," which was described. The covenants in the mortgage were made thus: "And I the said Abbott for myself and my heirs, executors and administrators, do covenant with the said Perkins and his heirs and assigns that I am lawfully seised in fee simple of the aforegranted premises; that I have good right to sell and convey the same," &c. And the last clause commenced thus: "In witness whereof I the said Albert Abbott, and Elizabeth Abbott wife of said Albert Abbott, in relinquishment of her dower, have hereunto set our hands," &c. This mortgage appeared to have been acknowledged by Albert Abbott alone, was dated in 1854, and was duly recorded. The land was owned, at the time of the execution of both mortgages, by Elizabeth Abbott.

The case was reserved for the determination of the whole court, with a provision that if the office copy is admissible in evidence, and sufficient in form to pass the title of Mrs. Abbott in her own right in the land, the case should be referred to

a master to state the account; if insufficient in form, the bill should be dismissed; if sufficient in form, but the copy is incompetent evidence, the case should stand for a hearing.

*S. B. Ives, Jr.*, for the plaintiff.

*D. Saunders, Jr.*, for the defendant. By the true construction of the language of this mortgage, it was the mortgage of the husband and not of the wife. *Bruce v. Wood*, 1 Met. 542. *Frost v. Spaulding*, 19 Pick. 445. *Bridge v. Wellington*, 1 Mass. 227. *Richardson v. Palmer*, 38 N. H. 212. *Flagg v. Bean*, 5 Fost. (N. H.) 62. An office copy should not be admitted of a deed of the land of a married woman, executed by the husband and wife, and acknowledged by him alone. See *Hathaway v. Spooner*, 9 Pick. 23.

BIGELOW, C. J. The deed conveyed the wife's title to the premises as well as the interest of the husband. By joining in the words of grant, she must be understood to have given and to have intended to give all the right and title she was capable of conveying, whether by way of passing an estate in fee or extinguishing or barring any other right or interest therein. It does not change or affect the legal operation of the conveyance that the wife did not join in the covenants contained in the deed. They would not be binding upon her. 2 Washburn on Real Prop. 564, and cases cited. The deed in question was made prior to the enactment of the statutes authorizing married women to enter into contracts in relation to their separate property. Nor was the property held to the sole and separate use of the wife. The legal title was vested in her, and it was held in her right as at common law. The conveyance was in the usual form to pass her right. The words of the grant are full and unqualified; nor is there anything to vary or modify their operation or effect in any part of the deed. The release of dower in the last clause is wholly immaterial to the construction of the previous words of grant. *Learned v. Cutler*, 18 Pick. 9. *Bartlett v. Bartlett*, 4 Allen, 440.

The office copy of the deed was competent secondary evidence. It was acknowledged by one of the grantors and duly recorded. An acknowledgment by both was not necessary.

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Rev. Sts. c. 59, § 12. *Catlin v. Ware*, 9 Mass. 218. *Shaw v. Poor*, 6 Pick. 86. The authorities are uniform that a registered copy is competent when the original deed cannot be obtained *Eaton v. Campbell*, 7 Pick. 10. *Burghardt v. Turner*, 12 Pick. 534. *Scanlan v. Wright*, 13 Pick. 523. *Ward v. Fuller*, 15 Pick. 185. *Commonwealth v. Emery*, 2 Gray, 80.

In conformity to the agreement of the parties, the entry is to be *Case sent to an assessor.*

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### NATHANIEL JOHNSON vs. JOHN H. MORSE.

A judgment in an action for the conversion of a tree is not conclusive evidence of title in a writ of entry to recover the premises on which the tree stood, although accompanied by proof that the only question litigated in the former suit was in regard to the title.

WRIT OF ENTRY. Plea, *nul disseisin*.

At the trial in the superior court, before Ames, J., the question appeared to be as to the course of the boundary line between adjacent lots owned by the demandant and tenant respectively. The tenant contended that the line was straight; and the demandant contended that the line made a curve towards the land admitted to belong to the tenant, and that he (the demandant) owned the land between this curved line and the straight line which the tenant considered to be the true boundary.

The tenant proved that he sold the wood standing on the disputed premises to Thomas W. Bailey, who cut a tree thereon, which was afterwards carried away by the demandant; that Bailey, by the request and at the expense of the tenant, brought an action in the nature of trover against the demandant to recover for the value of the tree, and recovered judgment thereon; and that at the trial the only question litigated was in regard to the title of the land, the present demandant justifying on the ground that he owned to the curved line. And the record of this judgment was put into the case.

The judge ruled that although this judgment was competent

cogent and persuasive evidence upon the question of title, yet it was not conclusive.

The jury returned a verdict for the demandant, and the tenant alleged exceptions.

*S. B. Ives, Jr.*, for the tenant. There is no doubt that evidence was competent to show what was actually litigated in the former trial. *Sawyer v. Woodbury*, 7 Gray, 499, and cases cited. It is a general principle that where there has been a full hearing, a judgment upon the point essential to the right determination of the controversy is conclusive upon parties and privies. *Eastman v. Cooper*, 15 Pick. 286. *Bigelow v. Winsor*, 1 Gray, 302. The fact that the former action was of a lower grade is immaterial. In those cases where a different doctrine is intimated, the title was not necessarily involved. See *Arnold v. Arnold*, 17 Pick. 4; *Wade v. Lindsey*, 6 Met. 407. The fact relied upon by the tenant was within the issue, and was actually litigated and decided. It is immaterial that the object of that suit was different. The same matter was in issue. *Outram v. Morewood*, 3 East, 366. *Kinnersley v. Orpe*, 2 Doug. 517. *Hopkins v. Lee*, 6 Wheat. 109. *Betts v. Starr*, 5 Conn. 550.

*H. Carter*, for the demandant, in addition to cases cited by the tenant, cited *Merriam v. Whittemore*, 5 Gray, 316; *Gilbert v. Thompson*, 9 Cush. 348.

BY THE COURT. It is common learning that the judgment in an action of trespass *quare clausum fregit*, on an issue joined upon the plea of soil and freehold, is not conclusive evidence of title in a writ of entry to recover the same premises, between the same parties. But not even the possessory right in the land was put in issue upon the record, in the suit, the judgment in which the tenant asked to have held conclusive in favor of his title; but merely the right to a tree which grew upon the land.

Undoubtedly, as the tenant contends, it is competent to prove by parol that something which the record shows may have been at issue was actually tried between the parties. And whatever was actually tried, and was essential to the judgment, is concluded by the judgment. But the point where the defence fails is this: that the seisin, which is in issue in the writ of entry,

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could not have been in issue in the former action. The judgment in the former action was conclusive on all that was adjudged in it; which was only the right of possession, and not the seisin.

*Exceptions overruled.*

**ELISHA K. PERKINS & another vs. JOHN H. NICHOLS & another.**

If no replication is filed by a plaintiff in equity, but the cause is set down for a hearing on the bill and answer, all the facts stated in the answer are to be taken as true, whether responsive to the averments of the bill or not.

If a conveyance of land is taken in the name of one who is but a nominal purchaser, and the purchase money comes from a married woman as agent of her husband, and the grantee named in the deed delivers to her a receipt for the money and a written promise to convey to her the estate on demand, and the estate is always treated by the parties as belonging to the husband, the grantee will hold the same in trust for the husband, and the facts creating such trust may be proved by parol evidence, and the grantee may discharge his trust after the husband has died intestate, by conveying the estate to his heirs at law. And the heirs of the wife, after her death, cannot maintain a bill in equity to compel a conveyance to them. And it is immaterial that one object of taking the conveyance in that form was to shield the estate from attachment by creditors of the husband.

**BILL IN EQUITY** brought by two of the heirs at law of Sarah F. Gardner, late of Salem, widow, deceased, setting forth that she died in 1863; that in 1846 John A. Nichols, being seised of a parcel of land in Salem, (which was described in a manner deemed insufficient by the defendants, though this became immaterial by the decision,) entered into the following agreement with Mrs. Gardner: "Salem, Feb. 2, 1846. Received of Mrs. Sarah F. Gardner forty-nine  $\frac{40}{100}$  dollars, amount of bill of lumber bought by her husband at auction; also four hundred and fifty dollars in full for lot of land on Endicott Street in Salem, the deed of which I promise to furnish to her order on demand. John H. Nichols." The bill further set forth that no such deed from Nichols to her could be found among her papers or on record, and that Nichols has refused to execute such a deed to the plaintiffs as her heirs at law, but in May 1864 conveyed all his interest in the premises to Elizabeth B. Putnam, a daughter of Mrs. Gardner by her second husband, Samuel Gardner. The

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prayer was that said Nichols and Elizabeth B. Putnam, who were made the defendants, might answer certain interrogatories annexed to the bill; that the conveyance by him to her might be reformed or cancelled; that Nichols might be decreed specifically to perform his agreement above copied; and for other relief.

The defendants filed several answers. Nichols answered, amongst other things, that the premises were sold by him in 1846 as broker or auctioneer, and the money for the same was handed to him by Mrs. Gardner, and he gave her the receipt copied above, and took a conveyance to himself, and that, knowing that the estate was treated by Mrs. Gardner and her husband as belonging to the latter during their respective lifetimes, and believing it to be the property of the husband, and that it belonged to his estate after his death, he executed the deed to Elizabeth B. Putnam as sole heir of her father. He further stated, in reply to a specific inquiry by the plaintiffs, that he was inclined to think that Samuel Gardner was not insolvent in 1846, but that he had assumed certain liabilities by indorsement or otherwise, and was consequently somewhat careful about taking conveyances in his own name.

Elizabeth B. Putnam answered, amongst other things, that she was informed and believed and was ready to prove that when her mother received the paper in question from Nichols she was acting as agent of said Samuel Gardner; that the lot of land was purchased for him, and with money furnished to her by him; that it belonged to him and was always treated by him and his wife as his, she at no time during her life making any claim to the same; and that he was in possession of the same until his death in 1859, and built a dwelling-house and made other improvements thereon.

The case was set down for a hearing on the bill and answers, and was reserved by *Hoar, J.* for the determination of the whole court.

*D. Roberts*, for the plaintiff. All defensive allegations, not responsive to the bill, are treated as immaterial. Were it otherwise, what Mrs. Putnam "is ready to prove" is incompetent,

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as its only effect would be to contradict the written contract of Nichols. The theory of the defence is based on an old fraud, under which Samuel Gardner, if living, could not protect himself. No man can take advantage of his own wrong. Nor is parol proof competent to establish such a fraud. The deed of Nichols to Mrs. Putnam does not improve the case for the defence. It was merely a voluntary conveyance, given apparently if not actually in derogation of the rights of others. The averment that Mrs. Gardner was her husband's agent cannot be established by evidence *aliunde*. *Stackpole v. Arnold*, 11 Mass. 27. *Fenly v. Stewart*, 5 Sandf. R. 105. *Colburn v. Phillips*, 13 Gray, 64. Fry on Specif. Perf. 122.

*J. A. Gillis*, for the defendants, cited *Livermore v. Aldrich*, 5 Cush. 431; *Page v. Page*, 8 N. H. 187; *Pritchard v. Brown*, 4 N. H. 397; *Scoley v. Blanchard*, 3 N. H. 170.

COLT, J. This case comes before us for a hearing upon the bill and answer alone. The general rule in equity, that the answers of the defendants, so far as they are responsive to the bill, are evidence in their favor, and must prevail unless controlled by opposing proof, is not controverted. A distinction is made and relied on by the plaintiffs between those allegations which are responsive and those which are mere defensive allegations in the nature of pleadings. It is not always easy to draw the line between them. In this case it is not necessary to decide whether the facts stated in the answer are strictly responsive or not. When no replication is filed by the plaintiff, no issue made upon the truth of the defendant's allegations, but the cause is set down for hearing on the bill and answer, then the answer is to be considered as true throughout, in all its allegations, whether responsive or not; otherwise the defendant would be precluded from proving the allegations which are only defensive. *Buttrick v. Holden*, 13 Met. 356. *Brinckerhoff v. Brown*, 7 Johns. Ch. 217 2 Dan. Ch. Pr. 840, *note*, 998.

The inquiry then is, whether upon this case as presented an equity is raised requiring the court to decree a conveyance to the heirs of Sarah F. Gardner of the real estate named in the receipt of the defendant Nichols, dated February 2d 1846.

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Whenever an estate has been purchased in the name of one person and the purchase money has proceeded from another, a resulting trust arises in favor of the party paying for the property, and the nominal purchaser is held in equity as a mere trustee, upon the presumption that the party paying for the estate intended it for his own benefit. This presumption does not arise in a few excepted cases, where from the relation of the parties the payment may be supposed to be a gift to the nominal purchaser; as, for instance, where the purchase money is paid by the husband and the conveyance is to the wife; but even then the trust may be established by proof that the husband did not intend to give to the wife the beneficial interest in the estate. *Whitten v. Whitten*, 3 Cush. 191. The presumption arising from the bare payment of the consideration may in all cases be controlled and rebutted by other evidence showing that the party making the payment did not intend to become the equitable owner of the estate; but ordinarily, in the absence of such proof, the presumption stands, and courts of equity will enforce the trust in favor of the real purchaser, and decree a conveyance to him. *McGowan v. McGowan*, 14 Gray, 119. *Buck v. Warren*, Ib. 122, *note*.

The defendants in this case allege and offer to prove that at the time the defendant Nichols received the conveyance of the estate he was but a nominal purchaser; that the money paid for it was furnished by Samuel Gardner; that, though the money was handed to him by Mrs. Gardner, and the writing of February 2d 1846 given to her, yet she was in that transaction acting as the agent of her husband; that the land was purchased for him, and belonged to and was always treated by him and his wife as his property, and not the wife's, and that she at no time during her life made any claim to the same. Taking these allegations to be true, and applying the doctrine in equity above stated, it is plain that if the deed had been given to Mrs. Gardner at the time of the sale, she would have held as trustee for Samuel Gardner and his heirs; and it follows that the defendant Nichols, who took the conveyance to himself, held under the same resulting trust in favor of Samuel Gardner and his



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conveyance to the defendant Mrs. Putnam, as heir to Gardner, was a proper discharge of the trust. Nor is it any objection that the facts upon which this trust is to be established must be made out by parol evidence, even though the recital in the deed that the consideration was paid by the nominal purchaser is thereby contradicted. The facts being proved by any competent evidence, written, verbal or circumstantial, the trust follows by implication of law. Gen. Sts. c. 100, § 19. *Livermore v. Aldrich*, 5 Cush. 431. *Peabody v. Turbell*, 2 Cush. 226. Browne on St. of Frauds, § 92.

Upon the whole case, no equity is shown to compel a specific performance of the writing signed by Nichols, or the cancellation of the deed from him to Mrs. Putnam. And reaching this result, it is unnecessary to consider the objection taken by the defendants, that there is no sufficient description of the boundaries of the estate upon which to found a decree.

*Bill dismissed, with costs.*

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#### MARY B. CHAPMAN vs. ALANSON BRIGGS.

The St. of 1862, c. 198, requiring married women who do business on their separate account to file a certificate in order to secure their property from their husband's creditors, applies to furniture used in a boarding-house kept by a married woman.

REPLEVIN of household furniture. The defendant, as a deputy sheriff, had attached the furniture on a writ against the plaintiff's husband.

At the trial in the superior court, before *Morton, J.*, it appeared that the furniture was used in a boarding-house kept by the plaintiff; that her husband boarded with her, paying for his board; and that no certificate under St. 1862, c. 198,\* had been

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\* This statute provides that "any married woman now doing or hereafter proposing to do business on her separate account shall file a certificate in the clerk's office of the city or town where she does or proposes to do business, setting forth the name of her husband, the nature of the business proposed to be done," and

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filed at the time of the attachment. The defendant thereupon contended that the jury could not be authorized to find for the plaintiff as against an attaching creditor of her husband, and the judge so ruled. A verdict was accordingly returned for the defendant, and the plaintiff alleged exceptions.

*W. S. Gardner*, for the plaintiff.

*S. B. Ives, Jr.*, for the defendant.

BIGELOW, C. J. There is no foundation for the argument urged by the plaintiff that the statute is intended to apply only to cases where a wife carries on traffic in goods and merchandise and invests her own money in a stock in trade or in the manufacture and sale of articles on her own sole account. The language of the statute is broad and comprehensive, and includes property belonging to a married woman of every kind which is employed by her in carrying on business on her sole account. The object of the statute was to afford the means of ascertaining in which of the two persons, apparently in the possession and use of property in carrying on any kind of trade or occupation, the title is vested, so that all having occasion to transact business with either may regulate their dealings accordingly. The accomplishment of this object could not be effected if the words of the statute should be so construed as to exclude the kind of property which the plaintiff employed in carrying on the business of keeping a boarding-house. The case at bar is one which comes within the mischief which the statute was designed to remedy.

*Exceptions overruled.*

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certain other particulars; and that "in case no such certificate shall be filed, such married woman shall not be allowed to claim any property employed in said business as against any creditors of her husband, but the same may be attached on mesne process by any such creditor, or taken upon execution, against the husband of such woman."

## DAVID McAVOY vs. JOHN MEDINA.

A stranger in a shop who first sees a pocket-book which has been accidentally left by another upon a table there is not authorized to take and hold possession of it, as against the shop-keeper.

TORT to recover a sum of money found by the plaintiff in the shop of the defendant.

At the trial in the superior court, before *Morton, J.*, it appeared that the defendant was a barber, and the plaintiff, being a customer in the defendant's shop, saw and took up a pocket-book which was lying upon a table there, and said, "See what I have found." The defendant came to the table and asked where he found it. The plaintiff laid it back in the same place and said, "I found it right there." The defendant then took it and counted the money, and the plaintiff told him to keep it, and if the owner should come to give it to him; and otherwise to advertise it; which the defendant promised to do. Subsequently the plaintiff made three demands for the money, and the defendant never claimed to hold the same till the last demand. It was agreed that the pocket-book was placed upon the table by a transient customer of the defendant and accidentally left there, and was first seen and taken up by the plaintiff, and that the owner had not been found.

The judge ruled that the plaintiff could not maintain his action, and a verdict was accordingly returned for the defendant; and the plaintiff alleged exceptions.

*E. J. Sherman & J. C. Sanborn*, for the plaintiff, cited 1 Bl Com. 295; 2 Kent Com. (6th ed.) 356; *Bridges v. Hawkesworth*, 7 Eng. Law & Eq. R. 424; *Armory v. Delamirie*, 1 Stra. 505 *McLaughlin v. Waite*, 5 Wend. 404; *Mathews v. Harsell*, 1 E. D. Smith, 393.

*D. Saunders, Jr.*, for the defendant, cited *Lawrence v. The State*, 1 Humph. (Tenn.) 228; *Regina v. Pierce*, 6 Cox C. C. 117; *Regina v. West*, 1 Dearsly C. C. 402; *People v. M'Garren*, 17 Wend. 460; *Regina v. Kerr*, 8 C. & P. 176.

DEWEY, J. It seems to be the settled law that the finder of lost property has a valid claim to the same against all the world except the true owner, and generally that the place in which it is found creates no exception to this rule. 2 Parsons on Con. 97. *Bridges v. Hawkesworth*, 7 Eng. Law & Eq. R. 424.

But this property is not, under the circumstances, to be treated as lost property in that sense in which a finder has a valid claim to hold the same until called for by the true owner. This property was voluntarily placed upon a table in the defendant's shop by a customer of his who accidentally left the same there and has never called for it. The plaintiff also came there as a customer, and first saw the same and took it up from the table. The plaintiff did not by this acquire the right to take the property from the shop, but it was rather the duty of the defendant, when the fact became thus known to him, to use reasonable care for the safe keeping of the same until the owner should call for it. In the case of *Bridges v. Hawkesworth* the property, although found in a shop, was found on the floor of the same, and had not been placed there voluntarily by the owner, and the court held that the finder was entitled to the possession of the same, except as to the owner. But the present case more resembles that of *Lawrence v. The State*, 1 Humph. (Tenn.) 228, and is indeed very similar in its facts. The court there take a distinction between the case of property thus placed by the owner and neglected to be removed, and property lost. It was there held that "to place a pocket-book upon a table and to forget to take it away is not to lose it, in the sense in which the authorities referred to speak of lost property."

We accept this as the better rule, and especially as one better adapted to secure the rights of the true owner.

In view of the facts of this case, the plaintiff acquired no original right to the property, and the defendant's subsequent acts in receiving and holding the property in the manner he did does not create any

*Exceptions overruled.*

WILLIAM FLYNN *vs.* ALFRED TRASK.

An action by a lessee against a lessor of a tenement to recover damages for the breach of an agreement by the latter to keep the premises in good condition and repair, whereby water flowed into the tenement and compelled the plaintiff to vacate it, is not defeated by proof of negligence on the part of the lessee which contributed to the injury complained of, provided the defendant also was guilty of negligence in failing to keep the premises in repair.

In such action, the defendant has no reason to complain of instructions that "he was bound to do all that ordinary sagacity, prudence and foresight could do to keep the premises in good repair and condition, and that if the injury was owing to this want of repair and could have been prevented by such ordinary sagacity, prudence and foresight, then he would be liable."

CONTRACT brought to recover damages for breach of an agreement made by the defendant with the plaintiff that he would put certain premises in Lawrence, belonging to the defendant and occupied by the plaintiff, "in good condition and repair, and so keep and maintain them while the plaintiff used and occupied them."

At the trial in the superior court, before *Putnam, J.*, the plaintiff offered evidence tending to show that he was a tenant of the defendant, and that the contract declared on was made by the defendants at the beginning of the tenancy; that in March 1864 there was a storm of unusual severity, and the water flowed into the tenement, through the wall, and compelled the plaintiff to remove at midnight, and injured his furniture and provisions. The water had come into the tenement in January and February before, but repairs had been made which were supposed by the defendant's agent to be sufficient, but which the plaintiff at the trial contended were insufficient.

The defendant contended and offered evidence to show that, at the time the water came into the apartment before, some person had turned about a piece of tin, which the plaintiff had inserted into the end of the conductor, in such a manner as to carry the water away from the place provided for its passage, and that the water had gullied a hole into the ground, and he contended that the hole through which the water ran into the plaintiff's apartment, at the time complained of, entered at the place where this hole had been so previously made, and that

the injury in March was thus owing in part to the negligence of the plaintiff, and that therefore the plaintiff could not recover. The defendant's agent testified that, after the leakage in January, he replaced the spout so that the water would flow off properly, and that he never saw it again, except that after the injury complained of in March there were marks on the side of the building which looked as though some one had turned it back again, but there was no evidence to show that the plaintiff had put it on again, and the plaintiff denied that he had done so, or that he knew who turned it about as claimed.

The defendant's counsel asked the court to give the following instructions to the jury :

"1. The plaintiff must show that, while a tenant in said premises, he did not by his own fault or negligence contribute to bring about the injury, as by putting tin on to the house, and carrying the water off the stone, and made the defect in the premises, and that he himself exercised ordinary care and diligence to avoid any injury which might result from the defendant's negligence, and that if the plaintiff negligently caused the injury he cannot recover.

"2. If there was an express contract on the part of the defendant to make reasonable repairs, and if the defendant did not make such repairs, and for want of such repairs the premises were in an untenable and dangerous condition to live in, and the plaintiff knew them to be in such condition and continued to live in them when in such condition, and did not use and employ reasonable means and did not exercise due care, diligence and prudence to prevent the injurious effects which might result to him on account of the untenable and dangerous condition, he did not exercise due care, diligence and prudence, and cannot recover for any injury which happened to him in consequence thereof.

"3. If there was an express contract to make the repairs on said premises by the defendant, and if the defendant just before the storm and flood exercised ordinary and due care, prudence and caution in putting said premises in such reasonable condition and repair as was reasonably sufficient to resist and protect

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*Flynn v. Traak.*

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the premises against such storms, freshets and floods as ordinarily and usually occur at all seasons of the year, and not such as sometimes occur, and for an unimportant period of time, the defendant is not liable in this action.

"4. If there was an express contract to repair, the defendant is only obliged to make such reasonable repairs as a careful, prudent and discreet man would make to save and protect his own premises, and to make such reasonable repairs as would be reasonably necessary to make the premises wind and water tight against such storms, freshets and floods as ordinarily and usually occur at the different seasons of the year, and if the defendant did exercise such care, prudence and discretion, and did make such repairs, and it was an unusual and extraordinary storm, freshet and flood that gullied out and washed away the dirt and gravel about said premises and damaged the plaintiff, then the plaintiff cannot recover.

"5. If the defendant did expressly agree to make all repairs on said premises, and at or before the said storm, freshet or flood did make all the repairs the plaintiff demanded, and all the premises needed, and the plaintiff expressed himself perfectly satisfied with said repairs, and wished no more repairs, he waived all right to have more or better repairs made, and cannot recover for the injuries occasioned by their insufficiency.

"6. If the injury done to said premises and the plaintiff was caused by the unusual and extraordinary action of the elements or an act of God, a cause against which human prudence, foresight and care would not provide, and against which, common sense, prudence and ability would not make reasonable provision, the plaintiff cannot recover.

"7. If the plaintiff did fit a piece of tin on to the house so as to carry the water off from the stone provided to carry it off, and the water so carried off did make the hole on the premises which caused the premises to leak the second time, and the hole so made weakened the premises and contributed to the injury then the plaintiff did not exercise due care, prudence and caution and cannot recover."

The judge declined to give the instructions as prayed for, but did instruct the jury, "that the plaintiff must satisfy them that there was the express provision made which the plaintiff had declared on; that if it was so made, the defendant was bound to do all that ordinary sagacity, prudence and foresight could do to keep the premises in good repair and condition; that if the injury from the storm was owing to this want of repair, and could have been prevented by such ordinary sagacity, prudence and foresight, then the defendant would be liable for breach of his contract; that if the damage to the wall was wholly owing to the fault or negligence of the plaintiff, then the plaintiff could not recover; but if the improper use of the conductor by the plaintiff was not the cause of this injury, but the injury complained of was owing to a want of proper strength to resist the effect of the storm, which the defendant could have provided against, the plaintiff could recover for damages occasioned thereby; that if the agreement was made, and the damage was occasioned by want of proper repairs, the plaintiff could recover, though the defendant had no notice of the defect; and that if the plaintiff knew of this defect, and did not use proper and reasonable means to avoid the effect of it, and did not use proper and due care at the time of the flood to lessen the effect of the injury, this matter ought to be taken into consideration by the jury on the question of damages."

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

*J. C. Sanborn*, for the defendant. The plaintiff in an action like this must show that his own negligence did not contribute to the injury. *Brown v. Kendall*, 6 Cush. 292. 2 Greenl. Ev. § 473. Knowing of the danger to which he was exposed, he should have used due care to avoid it. *Holly v. Boston Gas Light Co.* 8 Gray, 123, and cases cited. *Sherman v. Fall River Iron Works*, 2 Allen, 524. The defendant was only bound to use ordinary care in making repairs. *Taylor Land. & Ten.* 343. He was only bound to provide against ordinary storms. *Sprague v. Worcester*, 13 Gray, 193. In this case, the act of the plaintiff contributed to the injury, and he cannot recover. *Parker v*



*Adams*, 12 Met. 415. *Brownell v. Flagler*, 5 Hill, 282. *Davies v. Mann*, 10 M. & W. 546. *Illidge v. Goodwin*, 5 C. & P. 190. *J. K. Tarbox*, for the plaintiff, cited *Drake v. Curtis*, 1 Cush. 395; *Commonwealth v. Bailey*, 11 Cush. 415; *Hayden v. Bradley*, 6 Gray, 425.

COLT, J. The first and seventh instructions asked for by the defendant could not have been properly given. They state propositions only applicable in actions of tort for an injury occasioned by the misfeasance or nonfeasance of the defendant. This case proceeds wholly upon the ground of a breach of contract by the defendant to put the premises occupied by the plaintiff in good repair, and so keep and maintain them. The defendant cannot excuse the non-performance of his contract by proof of the plaintiff's negligence and want of care. The promisor will be discharged from liability if he be prevented by the act or default of the promisee from performing the contract, but no such claim is made in this case.

The second instruction asked for seems to be founded on the same misapprehension, and confounds the well-established distinction above stated. Upon the question of damages and only in reduction of them, the conduct of the plaintiff in failing to exercise due care to prevent injury to himself by the defendant's failure to perform his contract was proper for the consideration of the jury. He can recover only for the consequences of the wrongful act of the defendant, and not for damages which might have been avoided by ordinary care on his part. *Sherman v. Fall River Iron Works*, 2 Allen, 524. No instructions were asked or objected to upon the rule of damages.

The third, fourth and eighth instructions prayed for, which substantially required the judge to rule that the defendant was bound under his contract only to the exercise of ordinary and due care in putting and keeping the premises in reasonable repair, are embraced in the instruction given as to the degree of foresight and prudence which the defendant was bound to use and in the rule stated that the injury from the storm must be owing to this want of repair. The instructions given were certainly sufficiently favorable to the defendant. As a general rule

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the performance of a contract is not excused by the occurrence of an inevitable accident or other contingency, although not foreseen or within the control of the party. The covenant of a lessor or lessee to repair is not discharged by the destruction of or injury to the premises by lightning, fire or wind. Chit. Con. (10 Amer. ed.) 803, and cases cited. In *Brecknock Co. v. Pritchard*, 6 T. R. 750, under a covenant to build a bridge in a substantial manner and to keep it in repair for a certain time, the party is bound to rebuild the bridge, though broken down by an extraordinary flood.

The fifth request for instructions asked was not authorized by any evidence in the case. There is nothing to show that the plaintiff ever approved of the repairs made, or waived his right to require more or better repairs to the premises.

The instructions given to the jury stated the rule of the defendant's liability to repair under his contract with sufficient accuracy.

*Exceptions overruled.*

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JOHN C. VENNARD vs. GEORGE MCCONNELL & another.

Upon the issue whether a debtor who asked an extension from his creditors at a particular time was then insolvent and had reasonable cause to believe himself so, evidence is incompetent to show that persons engaged in the same line of business at that time generally obtained an extension; that it was the general understanding among the trade that asking for an extension at that time was no sign of inability to pay debts; and that all persons in that line of business either temporarily suspended payment or asked for an extension at that time.

The rule of law by which the question is determined whether a debtor was solvent or insolvent at a particular time is not affected or modified by any general embarrassment of the operations of trade, arising from the existence of a civil war, or by the fact that all persons in the same line of business were unable to pay their debts at maturity.

If various issues have been submitted to a jury, on an appeal from the decision of a judge of insolvency refusing to grant a certificate of discharge to an insolvent debtor, and, upon one of them which was submitted under instructions to which no exceptions were taken, they have found a fact which will deprive the debtor of his discharge, a new trial will not be granted even if the instructions were erroneous concerning other issues, upon which they also found adversely to the debtor.

If various issues have been submitted to a jury, who after agreeing upon some of them and failing to agree upon others have improperly separated without leave of the court, their findings upon those issues in regard to which they agreed will not be set aside, if it appears to the court that their failure to reach a verdict on the others did not result from inability to agree on any element common to all the issues.

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**APPEAL** from a decree of the judge of insolvency, refusing to grant a certificate of discharge to an insolvent debtor. Thirty nine issues were framed and submitted to the jury. The first and second were afterwards waived; the next thirty-six each charged that Vennard, the appellant, within one year previous to the filing of his petition in insolvency paid or secured in whole or in part a preëxisting debt or liability to a person therein named, he the said appellant being then insolvent and having reasonable and sufficient cause to believe himself insolvent; and the last one charged that the appellant, being a merchant or tradesman, did not subsequently to July 6th 1856 keep proper books of account.

At the trial in the superior court, before *Putnam, J.*, George McConnell, one of the assignees, was called as a witness by the appellees, and testified that he was in the leather business in 1861, as a member of the firm of George G. Gove & Co. On cross-examination he stated that that firm failed in 1861, and the following questions were then propounded to him by the appellant, for the purpose of showing the condition of business in the summer and spring of 1861, and the course and usages of trade in this particular branch of business at that time, and thus of showing that Vennard (who was also in that business and was shown to have asked an extension at that time) was not insolvent and had no reasonable and sufficient reason to believe himself so :

“ Did not persons engaged in the shoe trade in the spring and summer of 1861 generally if not invariably obtain an extension ?

“ Was it not the usual course of business in the shoe trade, at that time of that year, to ask for and obtain an extension ?

“ Was it not the general understanding among the trade that asking for an extension at that period by people who had southern paper on hand was no sign of inability to pay their debts in full ?

“ Did not all persons within your knowledge, connected with the southern shoe trade, either temporarily suspend or ask for an extension, in the spring and summer of 1861, without exception ? ”

These questions were severally objected to and ruled to be incompetent. It had previously appeared in the case that the appellant's sales were exclusively in New Orleans.

The appellant testified that he commenced his shoe business about the year 1853, and that in the early part of the spring of 1861 he applied to all of his creditors for an extension, stating his belief that if he was allowed to go on with his business he could pay them in full; and that they all agreed to extend his paper, and allow him to go on with his business as before. This evidence was controverted, as to certain of the creditors.

The appellant asked for the following instructions to the jury :

“ That in determining the question whether Vennard was actually insolvent and had reasonable and sufficient cause to believe himself so, at the time of making any of the payments alleged to be preferences, the jury are to consider all the circumstances of the case, the condition of the country and the habits and usages of the place where he did his business, and of the particular branch of business in which he was engaged; and particularly the agreements of the parties to whom he was indebted. And if the jury find that as matter of fact all the creditors to whom he was indebted, before the maturity of their notes, agreed that they would wait upon him, and consented that he should go on with his business and manufacture his goods substantially as he did go on with his business and manufacture his goods, this fact is most material in determining the question whether he was insolvent within the meaning of the law. In considering the question of what the insolvent owed, and in determining whether he was able in the spring and summer of 1861 to meet his obligations and pay his debts as they became due in the ordinary course of business, as men in similar business usually do, the jury are to consider not only the written contracts of the parties but also any agreement which they find to be proved in regard to an extension of the time of payment. And if they do not find that he was not able, or had no reasonable or sufficient cause to believe himself able, to pay his debts as they became due, under all the agreements of the parties,

including such extensions, then it is not sufficient upon this part of the case."

The judge refused to give these instructions, but instead thereof instructed the jury as follows:

"That a debtor might be said to be insolvent within the meaning of the act when he was not in a condition to pay his debts in the ordinary course of his business; that this rule might be modified by the habits and usages of the place where the debtor resided and of the particular branch of business in which he was engaged; that the agreement of his creditors to give him an extension did not bear upon the question of his insolvency, if he was thus unable to pay his debts, but that their agreements might have a bearing upon the question whether his payments were preferences; that if the jury found that as matter of fact all his creditors before the maturity of their notes, upon his representation to them that he could not pay them at maturity, agreed that he might go on substantially as he did go on, and particularly might pay the creditors whom it was claimed that he did pay, they would be estopped from claiming in these proceedings that the payments which he made were preferences which would prevent his discharge; that for this purpose and as bearing on this point in the case the agreements of the parties in reference to such extension were proper for them to consider;" and the judge left it for the jury to say whether there was any such agreement or understanding.

The jury were instructed, with the consent of parties, to seal up their verdict when they agreed, and return it into court in the morning. They retired shortly before the afternoon adjournment, and the officer in charge was instructed to keep them together until seven o'clock in the morning, unless they should agree at an earlier hour. At four o'clock in the morning they informed him they had agreed, and separated, having sealed their verdict.

Upon coming into court in the morning, the verdict was opened by the clerk, and it appeared that they had failed to agree upon a verdict upon certain of the issues, and had found some of the other issues for one of the parties and some for the

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other. The verdict upon the last issue was against the appellant.

The appellant thereupon objected to the affirmance of the verdicts, but the judge allowed them to be affirmed, so far as the jury had agreed. Subsequently, on the same day on which the verdict was rendered, and without the consent of the appellant, the appellees filed a waiver of the issues upon which the jury disagreed.

The appellant alleged exceptions.

*J. W. Perry & S. B. Ives, Jr.*, for the appellant. The several questions put to McConnell were competent. See *Lee v. Kilburn*, 3 Gray, 594. The court erred in refusing the instructions prayed for, and in giving those reported in the bill of exceptions. Even if the instructions prayed for were too broad, those given did not afford an intelligible rule to the jury. In a case where, from violent disturbances in the country, which it is hoped will be temporary, a whole branch of business is disarranged, and where all traders engaged in that business attempt to bridge over the difficulties until order is restored and communications reopened, so that remittances can be received from the disturbed districts of the country, and where all the traders engaged in that branch of business suspend payment and procure extensions of their credit, and at the same time insist that an individual shall not surrender his property under the insolvent laws, but shall go on with his business as usual, and thus labor to preserve the public faith and the public confidence, and an individual does go on in accordance with the general course of business of the time and place, and in accordance with the desire of all his creditors, and makes payment which within the strict rule of *Thompson v. Thompson*, 4 Cush. 127, would be preferences, we say the rule of law, under such circumstances, was not properly stated to the jury.

The jury were bound to pass upon all the issues submitted to them. *Holmes v. Wood*, 6 Mass. 2. But upon finding certain issues they might be discharged by the court without passing upon the rest. *French v. Hanchett*, 12 Pick. 15. *Sutton v. Dan*, 1 Met. 383. In this case the jury discharged themselves,

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and separated contrary to the order of the court. The issues were all so connected together that the jury, if compelled to find the undetermined issues, might have revised their whole verdict.

In reference to the last issue, the appellant is confident that the superior court would grant him a discharge, upon an inspection of his books, notwithstanding the verdict. The finding upon this issue, therefore, does not render the others immaterial.

*J. D. Ball*, for the appellees.

BIGELOW, C. J. We are of opinion that none of these exceptions can be sustained.

1. The questions put to McConnell, one of the assignees, were clearly incompetent. Passing by all other objections, a sufficient and decisive reason for refusing to allow them to be put is, that if answered in the affirmative they could have elicited no fact which had any tendency to support the issue on the part of the appellant. Viewed in the most favorable aspect for him, the answers would only have shown that other persons engaged in the same business as that carried on by him were, at or about the time inquired about, unable to pay their debts in the usual course of business, and were compelled to ask of their creditors an extension of the credit originally granted them. In other words, the appellant sought to prove that there was a general insolvency among a certain class of persons in the spring and summer of 1861. It is too obvious to admit of discussion that evidence that others employed in similar pursuits were in an insolvent condition had no tendency to prove that the appellant was not insolvent, or that he had not reasonable and sufficient ground to believe himself insolvent.

It is urged that proof of the habits and usages of the trade in which the appellant was engaged and of the usual course of business for the year were admissible, for the purpose of explaining the pecuniary condition of the appellant and rebutting the allegation of unlawful preferences of certain of his creditors. It is doubtless true that in many cases the abstract

rule defining the insolvency of a trader may be modified by the habits and modes of dealing in the town or city where a debtor resides, and of the particular branch of business in which he may be engaged. But this proposition does not extend far enough to embrace the case which the appellant attempted to prove. His offer was not to show that an established usage of business prevailed in carrying on the trade in which he was engaged, but only that during a particular season in the year 1861 large numbers of persons employed in the same kind of business were unable to pay their debts as they fell due. This was in effect nothing more than an attempt to show a general condition of insolvency among a certain class of persons at the time designated. Clearly evidence of such a nature had no bearing, direct or remote, on the subject matter of inquiry before the jury.

2. The instructions asked for were rightly refused, and those which were given were correct and well adapted to the issues which the jury were to determine. If they are open to any criticism, it is that they were too favorable for the appellant. Evidence to prove the general disturbance of business created by the civil war in the spring and summer of 1861, and the consequent inability of those engaged in certain branches of trade to pay their debts as they matured in the regular course of business, as conducted in seasons of public tranquillity and commercial prosperity, had no relevancy to the questions upon which the jury were to pass. The rule of law by which a condition of solvency or insolvency is to be ascertained and determined could not be affected or modified by any sudden, temporary or general embarrassment of the operations of trade, causing widespread monetary distress and mercantile disaster, whatever may have been the causes which led to such results. Nor can it be doubted that the appellant was insolvent in the legal sense of that word, if he was unable to pay his debts as they fell due according to the usage of the trade in which he was engaged, and of the place in which he carried on his business, in ordinary times and under ordinary circumstances, notwithstanding many others employed in similar



occupations may also have been in a like condition of insolvency. The proposition cannot be maintained, consistently with the established rules of law, that a debtor ceases to be insolvent because, being unable to pay his debts in the regular course of business, his creditors have entered into an agreement to extend the time of payment of their debts; or that the payment of a debt by a party who is insolvent cannot be regarded as a preference if made with the hope and expectation by the debtor that he will be able eventually to pay all his debts in full. The adjudicated cases leave no room for doubt on these points, *Thompson v. Thompson*, 4 Cush. 127. *Lee v. Kilburn*, 3 Gray, 594. *Holbrook v. Jackson*, 7 Cush. 136, 149. *Barnard v. Crosby*, 6 Allen, 327.

But it would not avail the appellant in this case if it could be made to appear that the instructions to which exceptions were taken were in any respect erroneous or defective. The object of submitting issues to the determination of a jury in cases like the one at bar is to ascertain whether any facts exist, the legal effect of which is to deprive the debtor of receiving a discharge from his debts under proceedings in insolvency. In this case the jury have found on a distinct issue, submitted to them under instructions to which no exception is taken, that the appellant, being a merchant or tradesman, did not keep proper books of account subsequent to July 6th 1856. This fact of itself, under Gen. Sts. c. 118, § 87, operates to deprive him of his discharge. It would seem, therefore, that all exceptions taken to the rulings of the court upon any other issue in the case are rendered wholly immaterial.

3. The separation of the jury without permission of the court before they had agreed on all the issues submitted to them was irregular and improper. But we cannot see that this misconduct of the jury ought to impair or affect the validity of their finding on other issues which were submitted to them, or that it should be allowed to operate to deprive the other party of the benefit of their verdict on the questions upon which the jury fully passed. It does not appear that the issues on which there was no verdict are so connected with or related to

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those on which they rendered a verdict as to make it probable that their finding would have been different, if they had been obliged to determine all the issues submitted to them. As the case is presented on the exceptions, each issue was distinct and separate. Although some of the same elements may have been involved in all the issues, it is clear that no one was exactly identical with any other. It is therefore the unavoidable inference that the failure to reach a verdict on some of the issues did not result from inability to agree on any element common to all, but that it must have arisen from a disagreement on some fact peculiar to the issue on which the jury failed to agree. Such being the state of the case, we are of opinion that the verdict was rightly affirmed upon those issues on which the jury agreed, and that the appellees were properly allowed to waive those issues which were left undetermined. *Hayward v. French*, 12 Gray, 453, 460.

*Exceptions overruled.*

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RUFUS C. HALL vs. JOHN J. MARSH & others.

A judge of probate and insolvency has no legal authority to expunge a claim which has been duly proved and allowed before him against the estate of an insolvent debtor, at a meeting subsequent to that at which the claim was proved, and without the consent of the creditor who proved it.

BILL IN EQUITY setting forth that the plaintiff duly proved against the estate of Bradley & Ordway, insolvent debtors, a note made by them, payable to George W. Lee, and indorsed to the plaintiff; and that at a subsequent meeting, upon the petition of the assignees in insolvency of the estate of said Lee, the judge of probate and insolvency ordered the proof in favor of the plaintiff to be expunged, and that said assignees had asked leave to prove said note in their own names. The prayer was that the order expunging the proof of the note by the plaintiff might be reversed, and that said assignees might be enjoined

from proving the same. The answer of the judge of insolvency, admitting the fact of the expunction, set forth that it was made to appear to him judicially that the transfer of the note by Lee to the plaintiff was fraudulent and void.

At the hearing in this court, before *Gray, J.*, it appeared that at the hearing before the judge of probate and insolvency upon the petition of the assignees to expunge the claim of the plaintiff no evidence was introduced except upon the point that the plaintiff had been summoned to appear and had failed to appear before that court, and the circumstances attending his neglect or refusal so to appear. The case was reserved upon the bill, answer, and the fact above stated, for the determination of the whole court.

*E. Avery*, for the plaintiff, cited *Merriam v. Sewall*, 8 Gray 320; *Stearns v. Kellogg*, 1 Cush. 449; *Hill v. Hersey*, 1 Gray 584; *Harlow v. Tufts*, 4 Cush. 448; *Eastman v. Foster*, 8 Met. 19; *Barnard v. Eaton*, 2 Cush. 294.

*S. B. Ives, Jr.*, for the defendants, cited *Hill v. Hersey*, 1 Gray, 584; *Agawam Bank v. Morris*, 4 Cush. 99, 104.

HOAR, J. The first question which presents itself in this case is, whether a judge of probate and insolvency has legal authority to expunge a claim which has been duly proved and allowed before him against the estate of an insolvent debtor, at a meeting subsequent to that at which the claim is proved, and without the consent of the creditor who proved it? In *Agawam Bank v. Morris*, 4 Cush. 99, 104, the question was suggested, but it was found unnecessary then to decide it. In *Hill v. Hersey*, 1 Gray, 584, it was held that this court, under its general superintendence and jurisdiction as a court of chancery, has the power to expunge a fraudulent claim, on the petition of the assignee. The opinion there delivered by Mr. Justice Thomas contains a strong implication that the power can only be exercised by this court; and such is now our decision.

The authority is certainly not expressly given to the judge of probate and insolvency by any statute. Nor do the insolvent laws confer upon him any general powers of a court of equity. The rules which regulate the proof of debts are very minute and

specific ; an appeal is given from the allowance or disallowance of a claim, which must be taken within a limited time ; and a broad original jurisdiction is given to this court as a court of equity, for the purpose of supervision and correction of errors, extending to all cases for which no other provision is made. To allow the judge of probate and insolvency to expunge the proof of a claim from which no appeal had been taken by the assignee would render the limitation of the time for taking the appeal of little value.

It is true that a creditor who had proved a claim by accident or mistake may be permitted to withdraw it in the court of insolvency ; and for some purposes may withdraw it without permission. *Bemis v. Smith*, 10 Met. 194. *Safford v. Slade*, 11 Cush. 29. But unless the rights of some other party have become involved, the withdrawal of a claim is a matter in which no one has any interest except the creditor who proved it ; and it differs wholly from the expunging of a claim against the will of its owner. The latter proceeding is in the nature of a review of a suit in which judgment has been entered ; and would require the express conferring of authority by the legislature to sanction it.

The conclusion to which we have arrived, that the judge of probate and insolvency had no power to make the order complained of, renders it unnecessary to discuss the correctness of the mode in which the supposed power was exercised. The decree expunging the proof of the petitioner must be set aside and annulled.

## WILLIAM W. KELMAN vs. JAMES E. SHEEN.

If a discharge in insolvency is pleaded in defence to an action upon a promissory note, the plaintiff may reply that the defendant's estate paid less than fifty cents on the dollar upon the debts proved, and that a majority in number of his creditors who had proved their claims did not assent to the granting of the certificate of discharge.

COLT, J. In defence of this action, which is brought to recover the amount due upon a promissory note, the defendant relies upon a discharge in insolvency, which he sets forth in his answer. To this the plaintiff replies that the discharge is invalid, because the estate of the defendant did not pay fifty cents on the dollar of the debts proved, and the assent of a majority of his creditors was not obtained according to the requirements of the statute. The defendant then demurs to the plaintiff's replication, assigning as cause of demurrer that the objections stated do not constitute legal objections to the defendant's discharge. The question of the conclusiveness of a discharge in insolvency in respect to the matters indicated is thus fairly presented upon the pleadings.

The insolvent courts of this commonwealth are courts of limited and special jurisdiction, proceeding not according to the course of the common law, but created and regulated wholly by statute. When acting within their jurisdiction their proceedings are conclusive; but inquiry may always be made to ascertain in any particular case whether that jurisdiction has been exceeded. The Gen. Sts. c. 118, § 81, provide that "a discharge shall not be granted to a debtor whose assets do not pay fifty per cent. of the claims proved against his estate, unless the assent in writing of a majority in number and value of his creditors who have proved their claims is filed in the case within six months after the date of the assignment." If, therefore, it is shown that a discharge has been granted in violation of these provisions, a case is presented where the court has plainly exceeded the power conferred by the statutes, and the discharge can have no validity. In all cases where courts of inferior jurisdiction have acted in a manner not authorized or expressly prohibited by statutes

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conferring or regulating the jurisdiction, the party aggrieved, if without laches, may treat such action as void, and aver and prove its nullity in court. *Smith v. Rice*, 11 Mass. 513. *Cook v. Darling*, 18 Pick. 393. Upon principle, then, the facts relied on by the plaintiff are sufficient to invalidate this discharge.

The defendant urges that in all cases where a discharge is granted, and objection is made that it is granted in violation of the express provisions of § 81, the only remedy is by appeal, as provided in § 85, and that it is only those objections which involve or compromise the moral conduct of the insolvent, enumerated in § 87, which can be availed of to invalidate a discharge once granted.

The right of appeal from the decision of the judge upon the question of granting the discharge is indeed given to both debtor and assignee; but the assignee cannot be said to represent the creditors who have not proved their debts, and his failure to appeal cannot affect their rights. Nor do the provisions of § 87, naming certain grounds upon which a discharge may be avoided, though not including those here relied upon, furnish any argument that it was the intention of the legislature to make the decision of the judge granting the discharge conclusive in respect to them. The judge is expressly required to pass upon the matters named in that section, and they are therefore clearly within his jurisdiction, so that his judgment thereon might well be held final unless appealed from, but for the provision which opens such matters in all cases where the discharge is pleaded.

But the question presented by the demurrer has been practically settled by the decisions of this court. A discharge granted at the third meeting of creditors called after the expiration of six months from the appointment of assignees, was held valid in *Williams v. Robinson*, 4 Cush. 529. Under *Sts. 1838, c. 163, § 12*, and *1844, c. 178*, it was held that where a third meeting of creditors had not been called, a certificate of discharge was not valid against a creditor who had not proved his claim. *Sanderson v. Taylor*, 1 Cush. 87. And in *Gardner v. Nule*, 2 Cush. 333, it was held that the certificate is not conclusive evidence of the facts stated therein, but the court may look into the

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record in order to determine whether the certificate was properly granted. The objections there made to the discharge were, that a majority of the creditors who had proved claims objected within six months, that, the estate did not pay fifty per cent. of the claims proved, and that the discharge was prematurely granted.

*Demurrer overruled.*

*S. C. Bancroft & N. J. Holden*, for the defendant.

*C. Sewall*, for the plaintiff.

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### GEORGE W. STONE vs. WILLIAM SEGUR & others.

Two or more persons who are joined as plaintiffs or defendants in civil actions have only the right collectively to challenge two jurors, under *St. 1862, c. 84*; and not to challenge two apiece.

In an action to recover damages for an assault and battery committed by rioters, in taking the plaintiff from a private house and tarring and feathering him, the defendants cannot be allowed to put in evidence declarations of other persons in the crowd, before coming into the plaintiff's presence, and while on their way thither, showing an intention to put certain inquiries to him, but not to inflict personal violence upon him; although some of the defendants were then present. Nor can they be allowed to prove that the plaintiff made certain statements to one of the defendants, in a conversation two hours before the assault upon him, and that the same were repeated to the crowd before they went to the house.

TORT against eleven persons to recover damages for an assault and battery. The defendants appeared by the same counsel and answered jointly.

At the trial in this court, before *Gray, J.*, the defendants claimed the right to challenge peremptorily two persons each, but were allowed to challenge only two in all.

The plaintiff introduced evidence that he was taken from a private house in Swampscott, on which he was at work, between nine and ten o'clock in the morning of April 15th 1865 by a crowd of men whom the defendants took part with or encouraged, and was forcibly led along the streets, tarred and feathered and otherwise ill-treated. The defendants offered to prove that after the crowd, then including three of the defendants, had assembled and were proceeding to the house where they found the plaintiff, and before they came into his presence,

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they used expressions indicating their intention to inquire of the plaintiff as to remarks which he had made about the death of President Lincoln, the news of which arrived early that morning, without anything to show an intention to use personal violence towards the plaintiff. But the evidence was excluded.

The defendants also offered to prove that on the same morning, two hours before the crowd went to this house, one of the defendants had a conversation with the plaintiff about the president's death, which conversation he reported to the rest of the crowd, after hearing which they went to the house. But this evidence was also excluded.

The jury returned a verdict for the plaintiff, with \$800 damages, and the case was reported for the determination of the whole court.

*S. H. Phillips*, for the defendants.

*W. D. Northend & S. B. Ives, Jr.*, for the plaintiff.

BIGELOW, C. J. We cannot doubt that the ruling as to the right of the defendants to challenge two only of the jurors called to try the case was in conformity to the true construction of *St. 1862, c. 84*. Prior to the enactment of that statute no right of peremptory challenge existed in civil cases. A party objecting to a juror was bound to satisfy the court that he did not stand indifferent in the cause, in order to claim the right to have him set aside. *Gen. Sts. c. 132, § 29*. But it being found by experience that prejudice or partiality might sometimes exist in the mind of a juror which could not be established by legal proof, it was deemed expedient and just that a limited right of peremptory challenge should be given to parties in civil actions. It was therefore provided by *St. 1862, c. 84*, that "either party in a civil cause and the defendant in a criminal cause shall, before the trial commences, be entitled to challenge peremptorily two of the jurors from the panel called to try the cause;" that is, that either of the two parties to an action, the plaintiff on the one hand, and the defendant on the other, should have the privilege of exercising this right. We think it clear that the legislature intended to use the words "either party" as indicating the two parties to a cause, regarding each as an inte-



gral unit, whether consisting of one or several persons. Such is the proper and technical signification of the word "party," as used in legal instruments and proceedings. It imports the person or persons in whom a joint legal right, interest or title is vested, or against whom a joint legal liability exists, and is properly applied to one person or to many persons, according as the subject matter of a contract or cause of action relates to or embraces a sole or a joint interest or title or liability. Thus, in a contract with a copartnership, the persons composing the firm form collectively one party to the contract, and in a suit brought by or against the firm on such contract the several copartners constitute the legal party to the action, either as plaintiffs or defendants. So in torts, persons having a joint right or interest which is invaded or destroyed, or who unite in inflicting a wrong or injury on the person or property of another, are in legal contemplation but one party, and are properly designated as such in all suits and proceedings brought to vindicate their right or to obtain redress for the wrong. It was in this sense that the word "party" was used by the legislature in the statute in question. The bias or prejudice against which it was intended to protect parties was not so much that which might arise in the mind of a juror from personal dislike or hatred of individuals who might happen to be plaintiffs or defendants in an action, but rather that which might relate to or grow out of the subject matter in controversy in a suit. This object would be fully attained by giving to the plaintiffs and defendants in an action, without reference to the number of persons joined on one side or the other, each the right to challenge two persons peremptorily. By the exercise of this right, each party to the suit would be enabled to guard against any undue partiality arising out of the subject matter in issue, to the extent of the two challenges allowed by the statute. If the legislature had intended to go farther, and to extend the privilege to each person who was joined as a party to a suit, it would have been expressed in clear and unambiguous language. In the construction of statutes which make innovations on the established course of proceedings in the trial of cases, it is the safer rule to hold that the

egislatore did not intend to provide for a greater or more radical change than the strict interpretation of the language of the statute will warrant. Certainly we cannot think that it was the intention of the framers of the statute under consideration, not only to confer the right to challenge two jurors on each party to civil actions, but also to extend the privilege so that the challenges might be multiplied by the number of persons who were joined either as plaintiffs or defendants in such actions. Such an interpretation would be enlarging the meaning of the words beyond their natural import, and would be inconsistent with the construction which has been given to similar provisions in other statutes. *Hayward v. French*, 12 Gray, 453. *Brady v. Brady*, 8 Allen, 101. The words of the statute respecting the right of challenge in criminal trials are different from those used in regard to civil causes, and are to be interpreted in view of other considerations which are not applicable in the present discussion.

The declarations or statements of persons in the crowd, which went to the plaintiff's house in company with some of the defendants when the assault was made on the plaintiff, were rightly excluded. They were not uttered at the time the acts charged in the declaration were committed, but before the defendants arrived at the plaintiff's house, and while they were going thither. Nor were they made in the plaintiff's presence. They were not therefore part of the *res gestæ*, nor did they tend to explain or justify or give character to the principal transaction which was in issue. They were only declarations of the defendants or their co-conspirators in their own favor, and could not have been admitted in evidence without a violation of elementary principles. The cases cited by the counsel for the defendants bear no analogy to the one at bar. In *Brown v. Perkins*, 1 Allen, 98, no evidence was admitted of anything which took place prior to the time when the alleged trespass was committed. In Lord George Gordon's case, 21 Howell's State Trials, 539, the cries and exclamations of the mob in which the defendant took part, and which were made in his presence, were admitted as evidence to inculcate him. But these were strictly

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*res gestæ*, and competent to show the nature and character of the acts in which the defendant participated. But in the case at bar the evidence rejected was offered by the defendants as substantive proof in their own favor, with a view to their exculpation. Nor was it in contradiction of anything adduced by the plaintiff in support of his case.

The evidence of a conversation held with the plaintiff two hours before the commission of the assault was also incompetent. It was wholly irrelevant and immaterial. It did not tend in any degree to justify or excuse the trespass, or to mitigate the damages. It was *res inter alios acta*, and had no bearing on any questions in issue before the jury.

*Judgment on the verdict.*

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JAMES DUGAN vs. JEREMIAH MAHONEY.

If a witness, on looking at a memorandum made by him at the time, is able from it to testify to the delivery of goods, the testimony is admissible, though he has no present memory of the transaction, and the memorandum itself has been held incompetent.

CONTRACT brought to recover for goods sold and delivered. At the trial in the superior court, before Putnam, J., a verdict was returned for the plaintiff, under circumstances stated in the opinion. The defendant alleged exceptions.

*G. A. Somerby*, for the defendant.

*S. Lincoln, Jr.*, (*S. B. Ives, Jr.*, with him,) for the plaintiff.

HOAR, J. The position assumed in support of the exceptions is a very narrow one, and is confined to the objection taken to the instructions of the court. Two witnesses were called to prove the delivery of numerous parcels of goods, consisting of rolls of leather. Neither of them had any recollection of the transaction. But one of them by looking at a memorandum book, in which were entries made by himself in the ordinary and regular course of business, was able to testify that he received from the plaintiff the twelve rolls of leather in question, and forwarded them to the defendant; and the other, by looking at certain checks which he had made in a memorandum book

testified positively that he knew he had delivered them. The books were first offered in evidence, and were rejected by the court upon the defendant's objection. The court instructed the jury in substance that they might consider the means of knowledge which the witnesses had. That they might consider their testimony, even though they testified that they did not remember, as matter of fact, the delivery of the goods, but were willing to swear that the leather was delivered, because they kept the books and found the leather checked upon the books and knew that it would not be so checked unless it had been delivered and that though the contents of the books were not competent evidence, yet they had the right to take into consideration the fact that such books were kept by them, and entries made by them, in the usual course of their business.

The objection to this instruction which is urged in argument is, that, the books having been excluded as evidence, and the witnesses not remembering the fact of delivery, there was no competent evidence to prove the delivery of the goods for the jury to consider; and that for the court to tell them that they might regard the fact that books were kept and entries made, was in effect to allow the jury to give weight as evidence to the contents of books which had been previously ruled out.

But we think the ruling was clearly correct. When the books were offered as independent evidence they were rejected. Whether, after the testimony of the witnesses was given, they would not have been competent evidence, we need not consider. But no objection was made to the use of the books by the witnesses to aid their recollection. The testimony of the witnesses was not excepted to, and was before the jury. The defendant then had a right to have the books shown to the jury, and to cross-examine upon them, if he desired it. But he did not. The testimony of the witnesses to their positive knowledge of the fact in issue, and their means of knowledge, were legitimately before the jury, and of course the jury must consider them. Why should they not?

The rule is thus stated by Mr. Greenleaf, in his treatise on Evidence, when giving the different classes of cases in which

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writings may be shown to witnesses to aid their recollection : “ Where the witness recollects having seen the writing before, and, though he has now no independent recollection of the facts mentioned in it, yet he remembers that at the time he saw it, he knew the contents to be correct. In this case the writing itself must be produced in court, in order that the other party may cross-examine; not that such writing is thereby made evidence of itself, but that the other party may have the benefit of the witness’s refreshing his memory by every part.” 1 Greenl. Ev. § 437. And see cases there cited. It is obvious that this species of evidence must be admissible in regard to numbers, dates, sales and deliveries of goods, payments and receipts of money, accounts, and the like, in respect to which no memory could be expected to be sufficiently retentive, without depending upon memoranda; and even memoranda would not bring the transaction to present recollection. In such cases, if the witness on looking at the writing is able to testify that he knows the transaction took place, though he has no present memory of it, his testimony is admissible. A similar rule is applied to attesting witnesses, who, if they know from seeing their handwriting that they witnessed the execution of the instrument, may so testify; although the sight of the handwriting does not bring to their recollection even the fact of attestation. *Rex v. St. Martin’s* 2 Ad. & El. 210. *Crittenden v. Rogers*, 8 Gray, 452.

*Exceptions overruled.*

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 HAMILTON MUTUAL INSURANCE COMPANY vs. HARRISON PARKER.

After a decree of this court, under *Sts.* 1862, c. 181, and 1863, c. 249, ratifying an assessment by a mutual insurance company upon its members who at the time of the making thereof were liable to assessment, one whose policy had terminated within two years prior to the making of the assessment cannot object, in an action brought by the company to recover the amount assessed upon him, that the absolute funds of the company had not been exhausted; that he was not concluded by the order of the court relative to the assessment; or that, if liable at all, it was for less than the amount assessed upon him. The legislature have power to pass a statute authorizing this court, after a hearing in equity to ratify and confirm an assessment by a mutual insurance company upon its members who at the time of the making thereof were liable to assessment, and providing that the

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decree of the court ratifying the same shall be conclusive upon all such members as to the necessity of the assessment, the authority of the company to make or collect the same, the amount thereof, and all formalities connected therewith; without providing for other notice to such members than a general one, and without making any special provision for a trial by jury.

CONTRACT brought by a mutual insurance company to recover the amount of an assessment laid by the company and ratified by a decree of this court, upon a policy of insurance held by the defendant. At the trial in the superior court, before *Vose, J.*, without a jury, judgment was ordered for the plaintiffs, upon facts which are stated in the opinion; and the defendant alleged exceptions.

*T. L. Wakefield*, for the defendant. The *Ss.* of 1862, c. 181, and 1863, c. 249, are not conclusive upon the defendant of all grounds of defence, but only in the particulars therein named. Those statutes in terms apply only to persons liable to an assessment, and the question who is liable must be open on the trial. The purpose of the statutes was not to meet and try in that summary way each individual defence, but to settle the general legality of the assessment in the particulars specified. All individual grounds of defence, peculiar to the defendant in his case, and not included in the general correctness of the assessment, are still open. If the proceedings under these statutes are conclusive as to all grounds of defence, then the statutes are unconstitutional. Upon that construction, they deprive the defendant of the right of trial by jury.

*J. W. Perry*, (*S. B. Ives, Jr.* with him,) for the plaintiffs.

CHAPMAN, J. After the plaintiffs had put in evidence the defendant's policy, the records of the directors' meeting at which the assessment was voted, and the proceedings upon which a decree of this court was made affirming the assessment, the defendant rested his objection to the action on five distinct propositions.

The first was, that the absolute funds had not been exhausted. But by *St.* 1862, c. 181, § 3, it is provided that the decree of this court shall be conclusive upon the company and all parties liable to assessment or call, as to the necessity of the assessment, the authority of the company to make or collect the same, the

amount thereof, and all formalities connected therewith. The amount of the assessment which was fixed by the decree included the consideration of all the funds of the company, and is conclusive on that point.

The second objection was, that the defendant was not concluded by the order of the court relative to the assessment. There seems to have been no special ruling on this point. It is true that the statute enumerates the particulars as to which the decree shall be conclusive, and the persons as to whom it shall be valid. The policy, as to which no objection is stated, was dated March 16, 1859, and terminated March 15, 1862. The directors' meeting was held December 10th 1863, which was within two years after the expiration of the policy, and thus the limitation as to assessments had not expired. Gen. Sts. c. 58, § 54. Thus it appeared that the defendant was one of the persons upon whom the decree was conclusive.

The third objection was, that if the defendant was liable to assessment it was only for one half the amount claimed. But this is one of the particulars as to which the decree was conclusive.

The fourth objection was, that there can be no capital stock in a mutual company. The materiality of this objection has not been pointed out, and we do not perceive its relevancy.

The fifth objection was, that the statutes of 1862, c. 181, and 1863, c. 249, are unconstitutional. The objection urged against them is, that they make no provision either for summoning in the persons to be assessed, or for a trial by jury.

Provision is made for a general notice to all parties interested to appear, by publication or otherwise. St. 1862, c. 181, § 2. Such a notice is provided for in many legal proceedings, and is quite common in probate courts, even when important rights are to be decided. Where there are many parties, as in cases like the present, it would be impracticable to give personal notice to all, and a general notice by publication is resorted to as being practically sufficient. The want of a provision for giving a more particular notice is not an objection to the constitutionality of a statute of this character.

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The provision of the same section, that all questions that may arise shall be heard and determined as in other equity cases, is a sufficient provision for a hearing by jury. *Charles River Bridge v. Warren Bridge*, 7 Pick. 368. In all cases in equity, the court directs an issue to be framed for a trial by jury when it is deemed essential to the rights of either party that such a trial shall be had.

It is suggested in the argument of the cause that the plaintiffs violated the laws of the Commonwealth in issuing their policies; and that the defendant never became a member of the company, and therefore was not liable to assessment. But these objections were not made at the trial, and there is nothing stated in the bill of exceptions upon which they can arise.

*Exceptions overruled.*

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NEHEMIAH BERRY & others vs. THOMAS RADDIN & others.

Depositions taken in 1878 before a judge of a court and certified by him and immediately afterwards recorded in the registry of deeds under a colonial statute authorizing the same to be done, although *ex parte*, are competent evidence to prove a prior grant of land by vote of a town, it being shown that the town records of that time have all been destroyed.

A grant by the town of Lynn of the use of the water of a stream flowing from a "great pond," and of the right to make sluices, and build a dam at the head of the stream in order to create a head of water, prior to the colony ordinance of 1641-47, and before any of the land bordering on the stream had been granted, vested a valid title in the grantees.

BILL IN EQUITY to restrain the defendants from damming up and using the water of Strawberry Brook in Lynn to the injury of the plaintiff's mill situated upon the same stream below.

The plaintiffs claimed title under an alleged grant by the town of Lynn to Edward Tomlins, his heirs and assigns, of the land where their mill is situated, and also the right to the free and uninterrupted use and control of all the water in the brook from Flax Pond, from which it flows, to the mill, a distance of about one mile and a half. It was agreed that the plaintiffs have the title of Tomlins, whatever that might be; that Flax Pond is a



natural pond, having an area of more than ten acres; and that it and the stream are within the limits of Lynn. The other facts are stated sufficiently in the opinion.

The case was reserved, by *Chapman, J.*, for the determination of the whole court.

*H. W. Paine*, (*D. Peabody* with him,) for the plaintiffs.

*J. G. Abbott*, (*T. B. Newhall* with him,) for the defendants.

BIGELOW, C. J. It seems to us that the depositions or affidavits offered by the plaintiffs in support of their title are competent and admissible. The plaintiffs seek to trace the grants under which they hold the property in controversy back to an early vote of the town of Lynn, passed in the year 1633. The production of the record of the doings of the town at that time is impossible, because all the books containing them prior to the year 1690 are either lost or destroyed. It was necessary, therefore, to prove the existence of the alleged vote or grant by secondary evidence. For this purpose, copies of the statements of certain witnesses taken under oath in 1678, of the vote passed by the town in 1633 granting the mill and water privilege in question to Edward Tomlins, the original grantee, were offered in evidence. These copies are duly certified by the register of deeds for the county of Essex as having been recorded in the books of record of that county in the year 1678, at or about the time the testimony of the witnesses was taken. By a colonial act of 1641-42, Anc. Chart. 86, the clerk of the county court was required to record all deeds and grants of lands, houses and hereditaments. By a subsequent act of the colony, Anc. Chart. 182, it was provided that every man should have liberty "to record in the public rolls of any court any testimony given upon oath in the same court or before two magistrates, or any deed or evidence legally confirmed, there to remain *in perpetuum rei memoriam*." By the copies of the depositions or affidavits offered by the plaintiffs, it appears that they were taken before William Hathorne, the *jurat* affixed to each of them purporting to have been certified by him as an "assistant." By reference to 5 Mass. Col. Rec. 179, of the date of May 1678, a few weeks prior to the time when the testimony of these witnesses was taken, it

appears that William Hathorne, then one of the assistants of the colony, was appointed, commissioned and empowered to keep the county courts for that year in Norfolk, which at that time embraced the northeasterly portion of the territory now included within the county of Essex.

These facts, relating to a matter of such ancient date, leave no room for question as to the competency of the documents as evidence, and to remove all doubt or suspicion as to their genuineness and authenticity. They purport to be the testimony of witnesses given before a judge of a court. They were certified by him, and were placed on record immediately after they were taken. The fact that they were so entered of record affords a strong presumption that they were duly and properly taken, so as to come within the provisions of the law above cited, which required the clerk of the county court to put on record the testimony of witnesses, to be preserved in order to perpetuate the evidence of the facts to which they related. This appears to have been the only authority, under the laws then existing, by which documents of that character were permitted to be made matters of record. In this particular their competency rests on the same ground as that of other ancient writings which come from a proper custody and place, and this record furnishes sufficient ground for the presumption that they were duly and properly taken, and are admissible for the purpose for which the law authorized them to be put on the public records. The rules of law and the practice of courts regulating the competency of deeds, writings and documents of great antiquity, fully sanction the admission of these copies in evidence. *Rust v. Boston Mill Corp.* 6 Pick. 158. *King v. Little*, 1 Cush. 436. *Boston v. Weymouth*, 4 Cush. 538. 1 Greenl. Ev. § 570, and cases cited.

It is contended by the counsel for the defendants that, if the grant of the town of Lynn under which the plaintiffs claim is established by this evidence, it was not competent for the town to make it, and no valid title under it can be set up. There can be no doubt that the town of Lynn, by its establishment under the authority of the general court of the colony, became the

owner of all the land and water included within its boundaries, with full power to grant any portion of either, except such as from its nature they held in trust for a public use or purpose. This is not controverted by the defendants. The point on which they insist is, that one of the ponds mentioned in the alleged vote or grant of the town was of more than ten acres in extent, and that, being a "great pond," it was held by the town for the public use only, under the ordinance of 1647, and that they could not alien to an individual any exclusive title to it.

This would be true, if prior to the year 1647 the pond had not been appropriated to private persons. *West Roxbury v. Stoddard*, 7 Allen, 158. But the decisive answer to this objection to the plaintiffs' title is, that they do not claim any right or title to the pond or to the waters thereof, so long as they remain within its limits. The grant was not of the pond, but of the waters which flowed therefrom, and the right to regulate and control the flow thereof by the erection of dams and sluices and other methods at its outlet for the convenient and advantageous operation of a mill on the brook or stream which runs out of said pond. The grant of such a right could in no way interfere with any use for which the waters of the pond were held by the town under the colony ordinance, or impair the full enjoyment of it by the public. The grant was therefore one which it was competent for the town to make.

It is further objected by the defendants that the evidence of the grants from the town does not show a title in the plaintiffs to the use of the waters flowing from the ponds named in the bill, and in the brook or stream formed thereby, nor does it establish a right to regulate and control them to the exclusion of any right or title in the defendants thereto. But on looking at the depositions by which the terms of the grants are proved, it seems to us that they were so broad and comprehensive as to convey all the right in the waters flowing from the pond and in the stream connected therewith which the town could convey. It appears that two distinct votes were passed, giving a right to these waters to the original grantee, and that they both preceded any grant of any portion of the land bordering on the stream to

other persons. The second vote or grant was made because it was found that the right acquired under the first was inadequate to the operation of the mill, especially in a dry season, and the object of it was to extend the privilege so as to render it certain that "the mill could supply the town." There was no riparian proprietor on the stream at the time of the second vote, whose rights could be interfered with, it appearing that it was passed "before any meddow in the towne was granted to any man." By the evidence of one of the witnesses, the grantee "desired leave of the towne to make a dam in the upper pond to keep a head of water against the height of summer time," and the town granted him the place "freely for ye use of the mill that he might have supply of water to grind with." By the evidence of another witness the grant was "all the water and water-courses and sluices as his right, nor noe man was to molest him or trouble him in his proper right." It is difficult to see how the grant of all the water in the stream and the right to control and regulate its flow from the pond could be expressed in language more clear and comprehensive. And the intent that it should be taken in its broadest sense is manifest from the fact that the vote was passed in order to supply a deficiency which had been found to exist under the previous grant, and to render it certain that the mill on which the inhabitants relied for the grinding of their corn should have a sufficiency of water to operate it at all times. The rule of interpretation applicable to ancient grants of this species of property is, that the words are to be construed most liberally in favor of the grantee, especially where the subject of the grant was intended for a purpose of a *quasi* public character like a mill, which the necessities and convenience of the inhabitants of a town during the first years of its settlement absolutely required. It may be added that the ancient deeds in the line of the plaintiffs' title, subsequent to the grant of the town, clearly show that this interpretation of the words of the original grant is in accordance with the contemporaneous understanding of the extent of their title by the owners during a long series of years.

For these reasons, being also of opinion that the evidence of

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a right acquired by adverse use is insufficient to establish that ground of defence, a decree must be entered for the plaintiffs.

*Decree accordingly.*

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MARTHA MANNAN *vs.* CHARLES MERRITT.

CHRISTIAN ROTHFUCHS *vs.* SAME.

An attaching officer or creditor cannot inquire into the validity of a sale by the debtor of articles which were exempt from attachment.

A debtor is entitled to hold, under all circumstances, exempt from attachment, (in addition to other articles specifically enumerated in Gen. Sts. c. 133, § 1, cl. 1,) household furniture, of the class considered necessary for himself and his family, not exceeding one hundred dollars in value; and an attaching officer or creditor cannot inquire whether or not in a particular case that amount of furniture is necessary or not.

In an action against a sheriff for an attachment of goods which were by law exempt from attachment, the plaintiff may put in evidence a demand upon the indemnifying creditor, for a restoration of them, and a refusal by him.

Two actions for the conversion of certain articles of furniture and other household articles and wearing apparel. The cases were tried together, before *Ames, J.*, in the superior court.

It appeared that on the 22d of December 1863 the plaintiff Rothfuchs executed to the plaintiff Mannan, who was his sister-in-law, a bill of sale of certain of the articles of furniture. On the next day, these, together with nearly all the other personal effects of both of them, were packed upon a wagon to be transported to Boston, when they were all attached by the defendant, who was a deputy sheriff, upon a writ against Rothfuchs in favor of Wilder S. Thurston. Three days afterwards, the defendant selected out a portion of them, which he kept and sold upon the execution that was obtained in Thurston's suit, and restored a portion, which he said was the whole of the remainder.

Mannan was allowed, under objection, to testify to a demand made by her upon Thurston for a restoration of her wearing apparel and other articles, and his refusal to restore them. It subsequently appeared that he pointed out to the officer the property

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to be attached, and was present at the time of the attachment, and that the officer acted under his directions and with the understanding that he should be indemnified by him.

The defendant contended that the sale of December 22d was fraudulent and void as against creditors, and that the furniture included in this bill of sale could not be claimed as exempt on the ground of its being necessary for Rothfuchs and his family. Both of the plaintiffs testified that the sale was made in good faith and for value, and that it was made because Rothfuchs was going into a smaller tenement and had no further need of it; and the defendant thereupon contended that upon this evidence the furniture sold could not be claimed as exempt from attachment. The judge ruled that if Rothfuchs had no more than one hundred dollars' worth of furniture, so that what he had was exempt from attachment, then the portion of it sold to Mannan was not liable to be attached on a writ against Rothfuchs, even if such sale would have been fraudulent and void as against creditors if it had been a conveyance of property not exempt from attachment; and that an officer, attaching household furniture of the kind and description testified to in this case, (being cheap chairs, tables, carpets, a bureau, light-stand, and articles of that kind,) was bound to leave at least one hundred dollars' worth with the debtor, and acted at his peril.

The jury returned a verdict for the plaintiff in each case, and the defendant alleged exceptions.

*S. B. Ives, Jr.*, for the defendant.

*J. C. Perkins*, for the plaintiffs.

DEWEY, J. A creditor cannot by an attachment impeach the validity of the sale by his debtor of articles which are exempt by law from attachment, upon the ground that such sale was fraudulent as to creditors. *Rayner v. Whicher*, 6 Allen, 292. The articles of household furniture here sold to Martha Mannan were strictly within that class. The case differs in that respect from that of *Stevenson v. White*, 5 Allen, 148, and *Nash v. Farrington*, 4 Allen, 157, where the court held that the articles sold were not exempted articles, having never been appropriated specially to those uses or held for the particular

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purposes required to entitle them to exemption from levy of execution.

We see no objection to the competency of the testimony of Mannan's conversation with Thurston, the attaching creditor, by whose particular direction this property was attached, and her demand that he should restore the property to her. 1 Greenl. Ev. § 180. *Bayley v. Bryant*, 24 Pick. 198.

None of the rulings excepted to seem to apply to the case of Rothfuchs, unless it be that in which the presiding judge instructed the jury that an officer attaching household furniture of the kind and description testified to in this case was bound to leave one hundred dollars' worth with the debtor. The case showed sufficiently the character of these articles of household furniture, and that they were within the class exempted from attachment. As these articles fall within the class of articles exempted by Gen. Sts. c. 133, § 32, the court properly instructed the jury that an officer attaching household furniture of the kind and description that this was shown to be was bound to leave at least the value of one hundred dollars with the debtor. There had been no request made to the debtor to select, but the officer seized and removed the same, and subsequently returned such articles as he thought proper, taking upon himself the whole responsibility. He thereby became chargeable to the plaintiff for so much of the same as was exempt by law from attachment.

*Exceptions overruled.*

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JOSEPH CHEEVER vs. JOSEPH G. PERLEY.

The presumption of payment of a mortgage debt in favor of a mortgagor, who has been in uninterrupted possession of the mortgaged premises for twenty years, is not conclusive; but parol evidence, if relied upon to control it, should clearly show some positive act of unequivocal recognition of the debt within that time.

WRIT OF ENTRY brought in November 1864 to foreclose a mortgage of land in Saugus, executed by Lambert Tuttle to Levi Robinson in 1833, to secure payment of the sum of four hundred dollars.

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At the trial in the superior court, before *Putnam*, J., without a jury, it appeared that in 1836 Tuttle conveyed the premises to the defendant, subject to the mortgage; and in 1837 Robinson assigned the mortgage and note to the plaintiff's intestate. The defendant contended that the mortgage was barred by the statute of limitations, and that the note must be presumed to have been paid. To rebut the presumption of payment, the plaintiff offered the following testimony:

Joseph Cheever, the plaintiff, testified that "the defendant called on him to borrow four hundred dollars, and urged him for it; that he knew his son (the plaintiff's intestate) had the money, and he went with his son to the defendant, and his son let him have the money, and Robinson transferred the mortgage to his son. His son died sixteen years ago last August. The defendant never paid his son, though he promised faithfully to do it; and he called on the defendant a good many times, before his son's death and since, for the interest money on the note. The defendant once offered to give his son a mortgage on another house, in payment of the interest on the note. At other times he said he could not then pay, but would. He called within a year after his son's death. The defendant said to him once, since his son's death, that he did not know as he owed anything on the note, that his son had told him (the defendant) that he did not know as he should ever call on him for the note. The defendant never refused to pay till this last time he called, which was last fall."

On cross-examination he said that "he could not tell when he first called on the defendant for the money; could not say whether twenty or fifteen years ago; should think longer than ten years; could not give any idea when it was; could not say when first he called after his son's death; the defendant said he would pay the interest on the note by a new mortgage, before his son died; did not know how long ago this was; never found or saw any will of his son."

John Raddin testified that "he was at the defendant's house several months ago, when he spoke of a suit against him by Cheever. He asked the opinion of the witness, as to what he



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*Cheever v. Perley.*

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thought of a mortgage which had been standing upwards of twenty years; whether it was good. He said he was sued for the money, and Cheever had always given him to understand that he intended to give him the note; that he had urged Cheever to take interest, which he had refused; that the defendant asked him why he refused, and that he said, he need not trouble himself about it till he did; that he took it for granted, from that, that Cheever intended to give him the mortgage. He said he supposed there was a will, but could not find out; but if there was one, the note was undoubtedly given to him."

This was all the evidence offered by the plaintiff; and the defendant offered no evidence.

The defendant's counsel then insisted that this evidence was not sufficient, in point of law, to remove the presumption of payment; but the judge ruled otherwise, and decided as a matter of fact that the note was not paid, and found for the plaintiff. The defendant alleged exceptions.

*S. H. Phillips*, for the defendant.

*T. B. Newhall*, for the plaintiff, cited *Denny v. Eddy*, 22 Pick. 533; *Bass v. Bass*, 8 Pick. 187; *McDowell v. McCullough*, 17 S. & R. 51; *Goldhawk v. Duane*, 2 Wash. C. C. 323; *Christophers v. Sparke*, 2 Jac. & Walk. 223; *Trash v. White*, 3 Bro. C. C. 289; *Toplis v. Baker*, 2 Cox Ch. Cas. 118; *Meade v. Bandon*, 2 Dow, 268; *Reeves v. Brymen*, 6 Ves. 519.

*Colt, J.* The common law presumption of payment of the debt secured by a mortgage, which arises in favor of the mortgagor who has been in uninterrupted possession of the mortgaged premises for a period of twenty years, is not a conclusive presumption of law, but may be controlled by evidence of part payment of principal or interest, or other admissions or circumstances from which the jury would be authorized to find the debt still unpaid. And the question here is, whether the evidence produced was sufficient to defeat the presumption, the burden of proof being upon the plaintiff.

Trial by the jury having been waived, the case was passed upon by the court. The whole evidence is reported, and the defendant excepts to it as insufficient in law to support the finding

of the judge. A consideration of the weight of the evidence does not decide the question upon exceptions taken in this form. Whether the finding was against the evidence can only be considered upon a motion for a new trial. We are limited here to the inquiry whether there is any evidence, however slight in tendency, proper to be submitted to a jury, to prove the facts sought to be established. If there is no evidence, then the finding of the court must be set aside and treated as an error in law. *Forsyth v. Hooper*, ante, 419. *Polley v. Lenox Iron Works*, 4 Allen, 329. *Chase v. Breed*, 5 Gray, 443. *Commonwealth v. Ober*, 12 Cush. 498.

In examining the evidence, we cannot see that there was any recognition of the validity of this mortgage shown by any admission or act of the defendant within the period of twenty years. Upon the defendant's objection, the evidence, if any, afforded by the indorsements on the note was ruled out, and the decision of the court rested solely upon the testimony of the plaintiff and one other witness. The plaintiff's testimony in reference to the payment of four hundred dollars by his intestate to the defendant at the time of the assignment of the mortgage from Robinson had reference to a transaction which took place twenty-seven years before this suit was brought, and has no bearing upon the presumption arising from the conduct of the parties during the twenty years immediately preceding the date of the writ. The plaintiff also states that the defendant at other times promised to pay his son, and to give a mortgage on another house in payment of interest, but he fails to fix the time of any promise within the twenty years. He says, indeed, that the defendant never refused to pay until the last time he called upon him; but we think mere silent acquiescence in the plaintiff's demand is not sufficient to rebut the presumption. Some positive act of unequivocal recognition, like part payment or a written admission, or at least a clear and well identified verbal promise or admission, intelligently made within the period of twenty years, is required. Parol evidence, testimony of loose conversations had many years before, is to be cautiously received, when offered to defeat a presumption so beneficial in

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 Robbins v. Potter.
 

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quieting titles to real estate. The testimony of the other witness is open to the objections and falls short of the requirements above stated. It is to be remarked that the defendant was in no way personally bound for the payment of the mortgage debt, which was contracted by another party, and had no interest to extinguish the mortgage except as owner of the equity of redemption. The considerations stated are certainly quite as weighty, under these circumstances, in the defendant's favor. *Howland v. Shurtleff*, 2 Met. 26. *Denny v. Eddy*, 22 Pick. 533. *Jackson v. Wood*, 12 Johns. 242. *Dexter v. Arnold*, 1 Sumner, 109. *Whiting v. White*, 2 Cox Ch. Cas. 290. *Hughes v. Edwards*, 9 Wheat. 498. *Exceptions sustained.*

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### ANN ROBBINS vs. JOSEPH POTTER.

No action lies to recover for services rendered by a woman to a man while in his family and living with him as his wife, after the performance of a marriage ceremony between them, although in fact she had a former husband living, and he knew it; but she may recover for moneys paid by her for debts due from him to third persons, for articles furnished to the family, provided she can prove an express promise by him to repay the same, and that her payments and his promise were made without any reference to their continued cohabitation.

HOAR, J. The case which the bill of exceptions presents, in connection with the pleadings, is a very peculiar one, and requires a careful application of the rules of law which govern it. The plaintiff sues to recover compensation for services in the defendant's family, and for money paid to his use at his request. She declares in a name which is not his; and which does not indicate any relation between them; and in the usual form. The answer denies any contract between them, express or implied; and it also alleges that whatever services were rendered or money paid by her were performed and expended while she was living with the defendant as his wife, acting and holding herself out in that capacity. It does not aver that she was his wife, or that he supposed or believed that she was his wife.

Upon the evidence introduced and offered, the ruling of the judge at the trial that the action could not be maintained was right, so far as it related to the claim for services. The evidence which the plaintiff at first introduced was sufficient to prove an implied contract. But on cross-examination she testified that before the services were rendered the ceremony of marriage had been performed between them, and that during the whole time for which the charge for services was made she was living with him as his wife, and acting and representing herself as his wife. This was enough to defeat the action for services. If she was his lawful wife, she could not maintain any action against him. But if this defence was not open to him, either because he had not pleaded it, or from the additional facts which she offered to prove, it completely answered her case. It showed that the services were not rendered under an implied agreement to pay for them. Her offer to prove that the marriage was void, because she had a former husband living at the time, and that he knew it, had no tendency to prove an agreement by him to pay for the services rendered in his family while living with him as his wife. That the pretence of being his wife was a mere cover for her adultery and bigamy, and that he was equally guilty with her, did not make the value of the services which she rendered in that relation a debt from him to her. The facts negated the implication of a contract. The offer to prove that the labor was performed without any reference to their cohabitation, and that the cohabitation did not form any part of the consideration for the labor, was unavailing, because she had already admitted that it was for the work done in his family while thus living with him. We do not put this decision on the ground of estoppel, because she offered to show that he knew she was not his wife, and was therefore equally criminal with her; but on the ground that the whole evidence would not prove a promise to pay.

But on the other part of the case we think the plaintiff's exceptions must be sustained. The claim is for money paid at his request, and for debts which were due from him to a third person. The payments, it is true, were under circumstances

that seem to us scarcely to admit the conclusion that they were made lawfully. They were made continuously, from month to month, for groceries furnished to support the family. That a jury could find that they were so made, innocently, and without any agreement or understanding that the criminal relation should continue, being thus regularly and continuously made for the support of the parties in it, it is difficult to conceive. But we cannot see that it was legally impossible, and therefore the case should have been submitted to the jury with proper instructions.

If all the evidence offered had been heard, and had sustained the offer of proof, the case would have stood thus: The parties were competent to make the contract declared on. Past cohabitation is in itself a legal consideration for a promise to pay money; and is certainly no defence to an action on an express promise to repay money actually advanced. The plaintiff testified to an express promise of the defendant to pay her the money which she advanced to discharge a debt of his already incurred. It was possible that this promise was made from time to time, as she advanced the money, without any agreement or understanding that the cohabitation should continue; and if the jury should find this to be the true state of the case, there would be no legal objection to the plaintiff's recovery. The evidence offered should have been admitted, and the jury should not have been restricted to the consideration of a partial and garbled presentation of the facts. If the defendant had pleaded that the plaintiff was his wife, or if the evidence had shown that she had imposed upon him in assuming to contract a marriage, the rule of law would be different, and she might have been estopped to deny the existence of the marital relation. But upon the state of facts which she offered to prove, there was no injustice to him in disclosing the whole truth. Between these two adulterers there could be no deception, and no estoppel.

But on the other hand, while we think the court below erred in ruling as a matter of law what was only a strong presumption of fact upon the evidence, and which should therefore have been submitted to the jury, it is obvious that upon a new trial

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of the cause the jury should be instructed that if the plaintiff made her payments by reason of or in furtherance of the adulterous connection, the contract was illegal and void, and she cannot recover. And it will be their duty to consider that the money was constantly and repeatedly advanced by her in payment of the expenses incurred for their support in the immoral and illegal relation which they bore to each other.

*Exceptions sustained.*

*E. J. Sherman*, for the plaintiff, cited *Booth v. Hodgson*, 6 T. R. 405; *Phalen v. Clark*, 19 Conn. 421; *Gibson v. Pear-sall*, 1 E. D. Smith, (N. Y.) 90; *Bowry v. Bennet*, 1 Camp. 348.

*D. Saunders, Jr.*, for the defendant, cited *Divoll v. Leadbetter*, 4 Pick. 220; *Gregg v. Wyman*, 4 Cush. 322; *Spalding v. Preston*, 21 Verm. 9; *White v. Hunter*, 3 Fost. (N. H.) 128; *Edwards v. Stevens*, 1 Allen, 315; *Lord v. Parker*, 3 Allen, 127.

## REUBEN W. ROPES &amp; others vs. GEORGE LANE.

If a dealer in fish has agreed to sell to a purchaser all of a certain kind that he should pack during a season, at the market prices, and, after a sale and delivery of a considerable quantity, executes and delivers to him a bill of parcels of a quantity more, describing the same, and inserting the prices which they have fixed, upon or in anticipation of the arrival of the fishing vessels, and accordingly fish of the same kind described in the bill of parcels, though less in quantity, are stored in warehouses of the vendor, under direction of the purchaser, and the warehouses are filled with them, and the fish prior to being stored are inspected, marked and made ready for immediate shipment, the sale is complete and the title passes, even as against subsequent purchasers, although the quantity thus stored is not then ascertained nor the bill settled.

If, under such a general agreement as above recited, all the fish on hand at a particular time, in warehouses or on a wharf, are exhibited to the purchaser, and the prices for the particular kinds have been fixed, upon or in anticipation of the arrival of the fishing vessels, and the fish have been inspected, marked and made ready for immediate shipment, and they are all delivered to the purchaser with intent to complete the sale, and it is agreed that they shall be stored where they are for a time by the vendor at a particular price, the sale is complete and the title to the whole of the fish passes, as between the parties, although by mistake bills of parcels which are executed to exhibit the transaction omit to include a portion of them, and the bills are not then settled.

REPLEVIN of certain barrels and packages of mackerel. After the former hearing in the case, reported in 9 Allen, 502, the case was recommitted to the auditor, who made another report, and the facts found by him, which are material to be stated, in addition to those stated in 9 Allen, 502, are as follows:

By the original agreement of the plaintiffs, made in September 1862, to take all of the mackerel which Wonson & Brothers should pack that year, the prices were "to be according to the market prices for the same qualities and grades at the dates of the arrival of the several vessels with their fares." "And as the different vessels arrived, and at times in anticipation of their arrival, upon the receipt of advices, the prices were ascertained and agreed by the parties upon the fares brought or expected, and upon their arrival the several fares of mackerel were sorted and packed by or under the superintendence of S. G. Wonson, one of the firm of Wonson & Brothers, and by him inspected and branded, he being an inspector of mackerel, and made ready for market or shipment." "Towards the end of the fishing season, and before the mackerel were stored in the warehouses, the plaintiff Ripley Ropes gave direction to Wonson Brothers, being then together, to have the barrels of No. 1 mackerel and certain other smaller packages which he named stored in the warehouses until the warehouses should become full; and at the same time gave direction as to the disposition of the remainder after filling the warehouses, that they should be placed in the sheds and other places upon the premises properly secured, the most valuable to be stored in the safest places. To this the Messrs. Wonson assented, and G. F. Wonson gave order to have the mackerel stored in accordance, and the mackerel were accordingly rolled into the warehouses by or under the superintendence of said S. G. Wonson, he at the same time understanding and intending the same to be done for Mr. Ropes, and having no knowledge of any request or agreement by or with any other person in relation thereto. The precise time does not appear when Mr. Ropes gave this direction and this agreement as to the storing of the mackerel was made, but it was about the time the parties began to put the mackerel into the warehouses.

which was at the last of October or first of November, and at the latest was before the 10th of November, which was the date when the warehouse called the 'old store' was full. The warehouses were all filled by or before the 20th of November, and during this time the plaintiff Ripley Ropes was in attendance from time to time overlooking the operations, and saw that the mackerel were stored as he had directed and that the warehouses were filled, and no other form of delivery or acts of ownership were had or done up to this time, other than as above stated." "All the barrels and other packages of mackerel, before being put into the warehouses or stored on the premises, were properly branded or marked with the inspector's mark, and were in all respects ready for immediate shipment, and from the 20th of November to the time of the service of the writ in this action the warehouses remained closed and without change or diminution of their contents." The bills rendered to the plaintiffs enumerated a much larger quantity of No. 1 bay mackerel than were stored in the warehouses.

At the time of the agreement of Garland, referred to in the former report of this case, for storage of the mackerel bargained for by him, which at the earliest was on the 15th of November, the sale and delivery to the plaintiffs of the mackerel stored in the "old store" was fully complete; "and as to the remainder, stored in the middle and western fish-house, at the time of his said agreement on the 15th of November the delivery of the same to the plaintiffs had been commenced and was continued without change to its completion, and no part of the same was delivered to Garland; and further, the agreement for storage made by Garland, as shown by the written storage receipts taken by him, was for storage of the mackerel on the premises of said Wonson & Brothers, and there were on the 21st of said November stored on the premises aforesaid, and within the terms of his storage receipts, a larger number of No. 1 bay mackerel than is enumerated in the said storage receipts, to wit, not less than eleven hundred and fifty-three barrels, and no part of the same was separated or designated as the property of Garland. And on the first day of December 1862 the plaintiffs received



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from Wonson & Brothers two bills which were said to contain an enumeration of all the mackerel on their wharves and premises not already included in any former bill to them, and which from an examination of the packer's books appeared to include all that had not already been billed to the plaintiffs. And these two bills were accepted by the plaintiffs as containing an enumeration of all the parcels not included in any former bill to them; and afterwards, on the 19th of December, the plaintiffs settled and paid the same by a settlement of their account for goods and cash furnished to said Wonson & Brothers, by which it appeared that said Wonson & Brothers had been overpaid for all the mackerel billed by them to the plaintiffs. And at the same time the plaintiff Ripley Ropes with G. F. Wonson went upon the wharf, Wonson opened the doors of the warehouses, but no entry was made, or any count of the contents; and having seen the condition of the warehouses and the barrels on the wharf not housed or covered, Ropes agreed with Wonson that the mackerel should be stored during the winter in the warehouses and on the wharves, and that the plaintiffs should pay to Wonson & Brothers twelve and a half cents per barrel for storage. Ropes thereupon directed Wonson as to piling and rolling the barrels upon the wharf, under cover and out of the way of frost, so that there might be no hindrance from that source to shipments of the mackerel in the spring. And I find that on the said 19th day of December there was sufficient delivery to the plaintiffs of all the mackerel then on the premises that had not been passed to them before that time, and that the mackerel then on the premises were the same as were taken by the officer on the replevin writ in this action."

"The quantities of shore and bay mackerel actually sold are to be ascertained only from the testimony of parties acquainted with the trade, who on inspection of the bills determined the kind intended to be described, by inference from the price, or from the recollection of the parties as to the prices paid; and on comparing the bills thus explained by this testimony with the officer's return and the appraisement therewith, after deducting from the enumeration in the bills the amounts taken away,'

they were found not to correspond exactly with the mackerel on hand and delivered to the plaintiffs, being more of some kinds and less of others, and there was no satisfactory evidence from which the exact number could be stated of either bay or shore mackerel, of either grade or number. The mackerel were all described in the bills as No. 1, No. 2, No. 3, &c., without reference to the distinction between shore and bay, and were so sold "The custom of the trade in regard to these discrepancies between the enumerations in the bill and the packages found to have been delivered is as follows: If a greater quantity of mackerel is actually delivered of a particular number or grade than is specified, the price is fixed upon such excess according to the market value at the time the mackerel were taken; if the excess is merely of certain packages without increasing the quantity of mackerel, as two half barrels instead of one whole one, the purchaser pays the difference in the cost of the packages only, the price for the mackerel remaining the same. And such had been the uniform course of dealing between the plaintiffs and Wonson & Brothers, but nothing was said upon the subject at the time these mackerel were bargained for or the bills rendered. And upon these facts I find and report that there was on the 19th day of December aforesaid a complete sale and delivery of all the mackerel upon the wharves and in the warehouses of Wonson & Brothers to the plaintiffs, and of every package and parcel not previously sold and delivered; and that by the sale and delivery at that time and previously, as hereinbefore stated, the plaintiffs acquired the title to all the mackerel taken by the officer upon the replevin writ in this action."

The same auditor afterwards made a further report, as follows:

"The trial having been suspended for a more full report as to certain facts in relation to a particular bill settled November 24th 1862, a copy of which is annexed and marked "Bill No. 9," having heard the parties, I submit the following: That all the No. 1 bay mackerel which are enumerated in any of the bills from Wonson & Brothers prior to this bill had been taken and

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shipped by the plaintiffs on or before the 11th of November which was the date of their last shipment of that description of mackerel from the wharf of Wonson & Brothers; that the eight hundred and thirty-one barrels of No. 1 bay mackerel claimed by the Messrs. Chandler & Trull and Kittredge & Co. are a portion of the twelve hundred barrels of No. 1 bay enumerated in said bill; that the said bill was rendered to Ropes on or about the 10th of November, the prices of the mackerel having been fixed before, on the arrival of the different vessels, as stated in the report; that at the time he received said bill the parties from their knowledge of the business and observation of the proportions of the different kinds and qualities of mackerel packed out from the different fares that season, had satisfied themselves that there were upon the premises the number of mackerel of the kinds and qualities billed to the plaintiffs, and probably more, but the plaintiffs took no means to ascertain if the number billed to them had been actually inspected; that at the time Ropes received said bill he gave directions as to the storing in the warehouses, &c., as is stated heretofore in the report already submitted; that this bill was not settled until the 24th of November, at which date a settlement of accounts [was had], including this and several other bills of mackerel, one of which, with a bill of codfish also included in said settlement, had been taken and shipped by the plaintiffs on the 11th of said November; and that upon this settlement there was found due from the plaintiffs to Wonson & Brothers a balance of \$2321.62, for which the plaintiffs gave their due-bill, as was the custom of the parties in adjusting their accounts and settling the balance found due on either side from time to time."

(Bill No. 9.)

" East Gloucester, Nov. &amp; Oct. 1862.

Messrs. R. W. Ropes &amp; Co.

Bought of Geo. F. Wonson &amp; Bros.,

Dealers in Dry and Pickled Fish, also Choice Family Groceries

600 bbls.	No. 1 mackerel,	\$8	4800.00
177 " 1 qr.	No. 2 " "	\$6	1063.50

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50 bbls. lge No. 1 mackerel,	\$13½	675.00
600 " 1 half 1 qr. No. 1	\$10	6007.50
171 " 2	\$8	1368.00
Inspection &		160.72
		<hr/> 14,074.72

Rc. Pt. G. F. Wonson & Bros.  
Gloucester, Nov. 24th, 1862."

At the trial in the superior court, before *Ames, J.*, the plaintiffs read the auditor's report, and offered no other evidence. The defendant thereupon asked the court to instruct the jury as follows:

"1. As matter of law, the facts found and reported by the auditor, upon which he founded his conclusions, are not sufficient in law to authorize a verdict for the plaintiffs for the whole of the property replevied.

"2. The facts found and reported by the auditor, upon which he arrived at the conclusion that the different articles claimed by the plaintiffs in replevin were delivered to them by the original owners are not sufficient, as matter of law, to authorize the jury to find a delivery to the plaintiffs, as against the right and title of Kittredge & Co. and Chandler & Trull or the defendant.

"3. The facts found and reported by the auditor, as matter of law, are sufficient to require the jury to find that the No. 1 mackerel bargained and sold to Garland for Kittredge & Co. and Chandler & Trull, and for which said Garland took of the original owners the two storehouse receipts annexed to the auditor's report, were in the three storehouses named in the auditor's report, and were delivered so as to pass the title thereto to said Kittredge & Co. and Chandler & Trull, as against the plaintiffs.

"4. The facts found and reported by the auditor, upon which he arrived at his conclusions as to the title to the property replevied, as matter of law, require the jury to find a verdict for the defendant for eight hundred and thirty-one barrels of No. 1 bay mackerel stored in the three storehouses named in the auditor's report.

"5. Upon the facts found and reported by the auditor, and upon which he arrived at his conclusions as to the title of the property replevied, if the court should rule that the title of the plaintiffs in replevin was good and sufficient to entitle them to recover the eight hundred and thirty-one barrels No. 1 bay mackerel stored in the three storehouses named in the auditor's report, as against the defendant and the claim and title of Kittredge & Co. and Chandler & Trull, then as matter of law the defendant would be entitled to a verdict for the remainder of No. 1 bay mackerel stored on Wonson & Brothers' premises, and replevied by the officer in this case.

"6. Upon the facts found and reported by the auditor upon which he arrived at his conclusions in reference to the title to the property replevied at the time it was taken in replevin, the title and right of possession of Kittredge & Co. and Chandler & Trull to the eight hundred and thirty-one barrels of No. 1 bay mackerel stored in the three storehouses named in the auditor's report, as matter of law, was good and valid as against the title of the plaintiffs and entitled the defendant to a verdict for said eight hundred and thirty-one barrels.

"7. Upon the facts found and reported by the auditor, upon which he based his conclusions, the plaintiffs are not and the defendant is, as matter of law, entitled to a verdict for the excess of packages of mackerel replevied in this suit over and above those described in the plaintiffs' bills of sale referred to in the auditor's report."

The plaintiffs insisted that the case be submitted to the jury upon the auditor's report, as *prima facie* evidence, to be passed upon by the jury, with instructions as to what in law constitutes sale and delivery.

The judge declined to give the instructions asked for by the defendant, but did instruct the jury that upon the auditor's report they were authorized to find for the plaintiffs for all the property replevied in their writ. The defendant thereupon offered no evidence, and did not argue the case to the jury, and the jury found a general verdict for the plaintiffs. The defendant alleged exceptions.

*J. G. Abbott & L. Child*, for the defendant.

*J. W. Perry & S. B. Ives, Jr.*, for the plaintiffs.

CHAPMAN, J. At the former hearing of this case, (see 9 Allen, 502,) it appeared that a sale and delivery of certain barrels of No. 1 mackerel had been made by Wonson & Brothers to Garland, as the agent of other parties, which was completed on the 21st of November 1862. The case was recommitted to the auditor to report as to certain facts. One of the matters to be considered was, whether any of these same mackerel had been sold and delivered to the plaintiffs prior to that date. It there appeared that the agreement made by the plaintiffs with Wonson & Brothers in September 1862, for the purchase of all the mackerel that Wonson & Brothers should pack that year, was executory, and did not pass the property of the No. 1 mackerel in question. The further report finds that these mackerel are enumerated in a bill of parcels annexed to the report as "No. 9." This bill was rendered to the plaintiffs on or about November 10th, the prices of the mackerel having been fixed before, on the arrival of the different vessels, as stated in the report. It is further found that from their knowledge of the business and observation of the properties of the different kinds and quantities of mackerel packed out from the different fares that season, the parties had satisfied themselves that there were upon the premises the number of mackerel of the kinds and quantities billed to the plaintiffs, and probably more, but the plaintiffs took no means to ascertain if the number billed to them had been actually inspected. One of the plaintiffs then gave directions as to storing them in the warehouses, but the bill was not settled till November 24th.

Upon the principles stated in our former opinion, no mackerel would pass to the plaintiffs on the 10th of November that had not then been inspected, and were not in some way delivered, for the inspection was to precede the delivery. The payments did not constitute a delivery, for they were advances designed to be made beforehand. But the report further finds that by or before November 20th the warehouses were all filled by Wonson & Brothers in conformity with the directions of one of the

plaintiffs; that one of the plaintiffs was in attendance and saw them stored as he had directed; that before they were thus stored they were inspected and marked, and were in all respects ready for immediate shipment. It thus appears that as to these No. 1 mackerel Wonson & Brothers had completed everything which was to be done on their part before the 21st of November, and that the plaintiffs had them in their possession, and also a bill of sale of them. A settlement of accounts remained to be made. This was done on the 24th of November, but the sale and delivery was not delayed till that time. It thus appears that this sale of the No. 1 mackerel to the plaintiffs was completed prior to the sale to Garland.

The report also states some new facts in respect to the mackerel not sold to Garland, and not included in any of the bills of sale. On the first of December two bills of parcels were made which were then said to contain an enumeration of all the mackerel on the wharves and premises of Wonson & Brothers not included in any former bill to the plaintiffs, and from an examination of the packer's books this appeared to be the fact. They were accepted by the plaintiffs as such. On the 19th of December the plaintiffs settled their account with Wonson & Brothers, having overpaid the bills. The parties then went upon the wharf; one of the Wonsons opened the doors of the warehouses; one of the plaintiffs saw the condition of the warehouses and the barrels on the wharf not housed or covered, and it was agreed that the mackerel should be stored during the winter in the warehouses and on the wharves for a certain price agreed. All the barrels had then been inspected and branded, and were ready for immediate shipment. There was thus an actual delivery to the plaintiffs of the whole of the mackerel under an agreement for the purchase of the whole, and the intent of the parties was to complete the sale of the whole. The only defect in the transaction was that the bills of parcels did not enumerate all the articles that had been thus sold and delivered; and, though money enough had been advanced to pay for the whole, yet the payment had been unjust. These defects were the result of mistake, and not of

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intention. According to the principles stated in *Macomber v Parker*, 13 Pick. 175, and *Riddle v. Varnum*, 20 Pick. 280, the jury were authorized to find upon these facts that all these mackerel were then sold and delivered to the plaintiffs, so that as between the parties, they then became the property of the plaintiffs, notwithstanding the errors in the bills of parcels.

*Exceptions overruled.*



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## ABSENT DEFENDANT.

If a valid attachment has been made of the property of a defendant who has never lived in Massachusetts, and he, being out of the Commonwealth, acknowledges service of the writ and waives the benefit of the statutes respecting absent defendants, judgment may be rendered and execution issued against him upon his default, in the same manner as if the writ had been duly served upon him by an officer within the Commonwealth. *Richardson v. Smith*, 134.

## ACTION.

1. An action at law to recover damages for an injury which causes immediate insensibility, and death in fifteen minutes, survives to the administrator of the estate of the deceased. *Bancroft v. Boston & Worcester Railroad*, 34.
2. The sale of an article in itself harmless, and which becomes dangerous only by being used in combination with some other article, without any knowledge by the vendor that it is to be used in such combination, does not render him liable to an action by one who purchases the article from the original vendee, and who is injured while using it in dangerous combination with another article; although by mistake the article actually sold is different from that which is intended to be sold. *Davidson v. Nichols*, 514.
3. Commissioners appointed by the judge of probate to make partition of the real estate of a deceased person may, if they acted faithfully and impartially, recover full compensation for their services and expenses by an action against the petitioners for partition, although in making such partition they innocently departed from and acted in violation of the directions of the warrant under which they acted, and their report of their proceedings was not accepted and partition was not made, and their charges and expenses were not ascertained or allowed by the judge of probate. *Potter v. Hazard*, 187.
4. In such action evidence that the commissioners acted under the advice of the defendants' counsel, the defendants being present on some occasions when such advice was given, is competent for the purpose of showing their fidelity and impartiality. *Id.*

See LEASE, 1.

## ADULTERY.

A man may be convicted of adultery who in good faith and in the belief that she is a widow marries and cohabits with a woman who has left her husband and

remained absent from him for more than seven years together without hearing of him, if in fact her husband is still living. *Commonwealth v. Thompson*, 23.

AGENT.

See PRINCIPAL AND AGENT.

AMENDMENT.

See BOARD OF HEALTH, 1; RECOGNIZANCE, 1.

ARBITRAMENT AND AWARD.

If a matter in dispute is submitted to two persons, with authority in case of disagreement to choose a third person, the award of whom or a majority of whom, in case a third person shall be chosen, shall be final, and the two arbitrators, being unable to agree as to the amount of damages, appoint a third person "as umpire to act with us in the hearing and final decision thereof in the manner contemplated in said agreement," and the person so chosen, after a new hearing before all three of them, makes to the parties a written statement of his decision which shows that he arrived at it without consultation with the other arbitrators, and that he did not consider it to be his duty to fix independently the amount of damages to be awarded, but only to determine which of the others had fixed the sum nearest in his judgment to justice and equity, and he accordingly unites with the arbitrator who fixed the highest sum, and those two make an award of damages, by a separate paper, which does not show that the other arbitrator acted at all in the case, such award is void; although such third person declares his own opinion that the sum awarded is too small. *Haven v. Winnisimmet Co.* 378.

ASSUMPSIT.

1. If the purchaser of land at auction deposits with the auctioneer a sum of money, in compliance with the terms of sale, and the sale is afterwards abandoned by mutual consent of the parties, and the purchaser thereupon forbids the auctioneer to pay over the money to the vendor, and thus prevents him from doing so, the latter is not responsible to the purchaser for its return. *Robinson v. Trofitter*, 339.
2. If the purchaser of land at auction deposits with the auctioneer a sum of money, in the presence of the vendor and in compliance with the terms of sale, and the sale is not completed through the fault of the vendor, the latter is responsible to the purchaser for the return of the money, although he has never personally received the same. *Teaffe v. Simmons*, 342.

ATTACHMENT.

1. An attaching officer or creditor cannot inquire into the validity of a sale by the debtor of articles which were exempt from attachment. *Mannan v. Merritt*, 582.
2. A debtor is entitled to hold, under all circumstances, exempt from attachment

(in addition to other articles specifically enumerated in Gen. Sts. c. 133, § 1, *et. l.*) household furniture of the class considered necessary for himself and his family, not exceeding one hundred dollars in value; and an attaching officer or creditor cannot inquire whether or not in a particular case that amount of furniture is necessary or not. *Id.*

8. In an action against a sheriff for an attachment of goods which were by law exempt from attachment, the plaintiff may put in evidence a demand upon the indemnifying creditor, for a restoration of them, and a refusal by him. *Id.*

#### ATTORNEY.

1. The doings of the superior court removing an attorney from practice cannot be revised or corrected, after judgment, by this court on a writ of *certiorari*. *Randall, petitioner*, 472.
2. This court will not issue a writ of *mandamus* directing the superior court to restore an attorney at law whom they have removed from practice, although such removal was made without any previous written charge of misconduct against him, and without any summons or other process to bring him before the court; especially if it appears that in fact he had notice of proceedings in that court, and appeared therein, and had ample time allowed to him, and a full hearing on the merits, and that, on the facts found by the court, the removal was proper, and that after alleging exceptions to the judgment of removal, which were disallowed by that court on the ground that the subject matter was not open to exception, he omitted to prosecute them in this court, by proving them under Gen. Sts. c. 115, § 11. *Randall, petitioner*, 473.

#### AUCTIONEER.

See ASSUMPSIT, 1, 2.

#### BAIL.

A notice in the following form, though without date, served by bail upon the plaintiff's attorney on the day of surrendering their principal, was held sufficient: "You will please take notice that we the undersigned, sureties for B. in the case of A. v. B. now pending in the superior court within and for the county of Suffolk, have this day surrendered him to the keeper of the jail at said jail in said county of Suffolk, at 11½ o'clock, A. M." *Reed v. Maynard*, 394.

#### BAILMENT.

See COMMON CARRIER.

#### BOARD OF HEALTH.

1. If the selectmen of a town, acting as a board of health, have brought a bill in equity to restrain the exercise of an offensive trade or employment which they have prohibited, under Gen. Sts. c. 26, § 52, this court have power to allow an amendment thereof, by substituting the inhabitants of the town as plaintiffs, after the term of office of the selectmen has ceased. *Winthrop v. Farrar*, 398.

2. An order by the selectmen of a town, acting as a board of health, forbidding the exercise of an offensive trade or employment therein, need not be served by an officer. *Id.*
3. If the selectmen of a town, acting as a board of health, after passing a general order, under Gen. Sta. c. 26, § 52, forbidding the exercise of an offensive trade or employment therein, without first giving notice to those who at the time were engaged in carrying on the same, and after giving notice of the passage of such order to a person so employed, subsequently, and before the expiration of the three days allowed by § 56 for an appeal therefrom, give notice to such person of the presentation of a petition to them, praying for the passage of a similar order upon him, and appointing a time and place for a hearing, and if they do this with the intention of preventing him from availing himself of his right of appeal from the order which they have already passed, and he is thereby so prevented, and thereby loses his right of appeal, this court will not enforce the order of the board of health by a process in equity. And if they have done this without an intention to mislead him, or to deprive him of his right of appeal, but he and his counsel have been actually mistaken in regard to his right to appeal from the order, and he has lost his appeal by reason of this mistake, and the consequences to him will be serious, this court in its discretion may and will refuse to enforce the order. *Id.*

**BROKER.**

See **USAGE.**

**BURDEN OF PROOF.**

See **MARRIED WOMAN, 1.**

**CASES OVERRULED, DOUBTED OR DENIED.**

- JOHNSON v. ROBERTS**, 30 Eng. Law & Eq. R. 234. *Teaffe v. Simmons*, 344  
**OMMANNEY v. BUTCHER**, Turn. & Russ. 260. *Saltonstall v. Sanders*, 462.  
**THE REVENUE CUTTER No. 1**, 21 Law Reporter, 281. *Briggs v. Light-Boats*, 184.  
**WILLIAMS v. KERSHAW**, 5 Law Journ. (N. S.) (Ch.) 84. *Saltonstall v. Sanders*, 466.

**CERTIORARI.**

See **ATTORNEY, 1.**

**CHARITABLE TRUSTS.**

A testator bequeathed the residue of his estate to his executors in trust to hold and invest the same and the income thereof, and appropriate so much or the whole of the principal or income as they might think proper "to the furtherance and promotion of the cause of piety and good morals, or in aid of objects and purposes of benevolence or charity, public or private, or temperance, or for the education of deserving youths," and gave said trustees and their successors "full power, discretion and authority to appropriate and expend said income or capital in such manner as in their judgment may best promote the

objects above mentioned." *Held*, that by "objects and purposes of benevolence or charity, public or private," the testator intended general relief of the poor, either through public institutions or almsgiving by the agency of individuals; and that this was a good charitable bequest. *Saltonstall v. Sanders* 446.

### COMMON CARRIER.

1. If a common carrier by water cannot find the person to whom goods carried by him are consigned, or any person representing the owner, and thereupon delivers them to a responsible warehouseman for safe keeping, receiving from him payment of all his charges, and there are no special facts to show that the warehouseman undertook to act as bailee of the carrier and not of the owner or consignee, and the goods are never called for, the carrier is not entitled to reclaim them from the warehouseman by paying the amount of his charges. *Hamilton v. Nickerson*, 308.
2. A ferry company, being common carriers of passengers, are bound to furnish reasonably safe and convenient means for the passage of teams from their boats, appropriate to the nature of their business, and to exercise the utmost skill in the provision and application of the means so employed; but they are not bound to adopt and use a new and improved method, because it is safer or better than the method employed by them, if it is not requisite to the reasonable safety or convenience of passengers, and if the expense is excessive; and the cost of such improved method may be a sufficient reason for their refusing to adopt it. *Le Barron v. East Boston Ferry Co.* 312.
3. In an action against a ferry company to recover damages sustained in passing from their boat, through the negligence of the defendants in failing to provide a safe and sufficient drop over which to pass, proof of due care on the part of the plaintiff, and of the injury, will not raise a presumption of law that the defendants were negligent, or change the burden of proof which rests upon the plaintiff to prove their negligence; but the same may be taken into consideration by the jury and allowed such weight as they think reasonable, in view of the whole evidence. *Id.*
4. If a heavy article has been carried by a truckman to the depot of a railroad corporation, and injured while being loaded upon the cars, the railroad company are liable therefor if they had accepted and taken charge of the same; and in such case it is no defence to an action against them, that the injury resulted in part from the carelessness of the truckman. *Merriut v. Old Colony & Newport Railroad Corp.* 80.
5. If an arrangement is made between several connecting railroad companies, by which goods to be carried over the whole route shall be delivered by each to the next succeeding company, and each company so receiving them shall pay to its predecessor the amount already due for the carriage, and the last one collect the whole from the consignee, a reception of such goods by the last company, and a payment by it of the charges of its predecessors, will not render it liable for an injury done to the goods before it received them. *Darling v. Boston & Worcester Railroad Corp.* 295.

6. In an action against a street railway corporation to recover for the loss of a box of merchandise delivered to them to be carried for hire on the front platform of one of their cars, the plaintiff, for the purpose of showing them to be common carriers of goods, may prove that other persons had paid money to their conductors, with the knowledge of their superintendent, for the carriage of merchandise by them; and if it is proved that they were common carriers of goods, and that they received the box to be carried upon one of their cars for hire, and that it was lost during a trip, they are responsible for its value. *Levi v. Lynn & Boston Railroad Corp.* 300.

7. If in such case no instructions were asked or given at the trial in regard to the question whether the plaintiff was negligent in placing the box on the front platform of the car, or whether he actually placed the same in the custody of the defendants' servants, and the evidence upon these questions is not reported, they are not open for argument on the exceptions. *Id.*

See RAILROAD.

#### COMPLAINT.

See INDICTMENT.

#### CONSPIRACY.

A combination to induce a witness to go from one state to another to testify, by means of pecuniary inducements, is not a conspiracy, unless the design is to induce him to testify falsely; and therefore the acts and declarations of one of the persons so combining are not admissible in evidence against the others. *Commonwealth v. Smith*, 243.

#### CONSTITUTIONAL LAW.

1. The legislature have no power to pass a statute requiring domestic corporations to reserve and pay into the treasury of the Commonwealth a certain portion of all dividends declared by them on shares of non-resident owners. *Oliver v. Washington Mills*, 268.
2. The legislature have power to pass a statute authorizing this court, after a hearing in equity, to ratify and confirm an assessment by a mutual insurance company upon its members who at the time of the making thereof were liable to assessment, and providing that the decree of the court ratifying the same shall be conclusive upon all such members as to the necessity of the assessment, the authority of the company to make or collect the same, the amount thereof, and all formalities connected therewith; without providing for other notice to such members than a general one, and without making any special provision for a trial by jury. *Hamilton Mut. Ins. Co. v. Parker*, 574.
3. The legislature have power to pass an act providing that formal objections to complaints and indictments must be made at a particular stage of the proceedings. *Commonwealth v. Walton*, 238.
4. The legislature have power to make it a criminal offence to sell pure milk mixed with pure water. *Commonwealth v. Waite*, 264.

## CONTRACT.

1. An arrest, conviction and imprisonment for crime will exonerate a workman from the duty of giving to his employers two weeks' notice before leaving their service, under a contract by the terms of which he has agreed to give such notice, or not claim any wages due. *Hughes v. Wamsutta Mills*, 201.
2. A town passed a vote "that all men belonging to the town, enlisting into the service of the United States, and who shall be accepted and mustered into the service of the same, shall receive a bounty from the town of one hundred and twenty-five dollars," and at the same meeting passed another vote "that, shall the full quota required of the town be enlisted and accepted as aforesaid, an additional sum of seventy-five dollars shall be paid each man thus enlisting, but should there be a failure in making up the full quota of nine months' men then those enlisting and being accepted and mustered as aforesaid shall receive only the sum of one hundred and twenty-five dollars each." After the lapse of nearly four months the quota was not filled, and, a draft having been ordered, the town chose an agent who filled the quota by recruits from abroad. *Held*, that an inhabitant of the town who enlisted under the above votes was entitled to only one hundred and twenty-five dollars. *Bishop v. Inhabitants of Rochester*, 84.
3. An enlisted soldier can maintain no action against a town to recover bounty money, under a vote of the town appropriating a certain monthly sum during a certain time to each citizen who should enlist for the war, "to be paid in such manner and to such persons as the selectmen shall deem expedient." *Williams v. Inhabitants of Plymouth*, 86.
4. If prior to *St.* 1861, c. 222, a town had voted that a certain sum monthly should be paid to each citizen of the town who should enlist in the military service of the state with the intention of serving in the army of the United States, if called upon, a citizen who so enlisted under that vote may, under that statute, maintain an action against the town to recover such pay for a time not exceeding ninety days from his enlistment. *Grover v. Inhabitants of Pembroke*, 88.
5. The *St.* of 1863, c. 38, ratifying contracts of towns to pay bounties to soldiers, does not operate to revive a contract which had become extinct under *St.* 1861, c. 222. *Ib.*
6. If prior to *St.* 1861, c. 222, a town had voted to pay to each volunteer soldier raised and being an inhabitant therein and mustered into the service of the United States for the defence of the government a certain sum per month, and also "that each volunteer soldier belonging to this town be allowed one dollar per day for each and every day he is drilled under proper authority," and an inhabitant in pursuance thereof signs a paper enrolling himself with others into a company of volunteer militia for five years, "with the full understanding that we are liable at any moment to be ordered into active service under the government of the United States," and is drilled for several days under proper authority, and shortly afterwards enlists in the military service of the United States, he may under that statute maintain an action against

the town to recover such pay for a time not exceeding ninety days from his enlistment, and also for the time spent in drilling. *James v. Inhabitants of Scituate*, 93.

7. An enlisted soldier can maintain no action against a town to recover money for a uniform, under a vote of the town appointing a committee "to expend for each enlisted soldier a sum of money not exceeding ten dollars for a uniform." *Ib.*
8. No action lies to recover for services rendered by a woman to a man while in his family and living with him as his wife, after the performance of a marriage ceremony between them, although in fact she had a former husband living, and he knew it; but she may recover for moneys paid by her for debts due from him to third persons, for articles furnished to the family, provided she can prove an express promise by him to repay the same, and that her payments and his promise were made without any reference to their continued cohabitation. *Robbins v. Potter*, 588.

See CORPORATION, 2; CURRENCY; LEASE, 1; SOLDIER, 2.

### CONVERSION.

1. A tortious taking of chattels with intent to apply them to the use of the taker or some other person than the owner is a conversion. *McPartland v. Read*, 281.
2. One who is present at a tortious taking of chattels, directing and assisting therein, is liable for a conversion, although he acted as agent for a third person. *Ib.*

See OFFICER.

### CORPORATION.

1. If a company is incorporated with power to establish and maintain a ferry and to own and possess vessels, steamboats and other personal property not exceeding in value a certain amount, the court cannot say that a contract by the company to let one of its steamboats at a certain rate per day, to be used for no specified length of time and in no specified place, is in excess of its corporate powers, if there is no proof that the steamboat was not necessary or proper to be used in the prosecution of the business of the ferry, or that by reason of owning it the company exceeded the limits of property which it was authorized to hold. *Brown v. Winnisimmet Co.* 326.
2. If the treasurer of a ferry company agrees in its behalf to let one of its steamboats at a certain rate, with an agreement that if rechartered any surplus that may be received over the specified rate shall be divided between the company and the charterer, and the steamboat is accordingly rechartered at a higher rate, and the corporation allows it to go into the possession of the second charterer and remain in his use for several weeks, and after its return collects of such second charterer the sum which he promised to pay therefor, and enters the same upon its books, this is sufficient evidence to authorize a jury to find a ratification by the corporation of the contract of the treasurer. *Ib.*

See CONSTITUTIONAL LAW, 1; PLEADING, 5; RAILROAD, 3.



## COSTS.

Since the enactment of Gen. Sts. c. 156, § 5, if the plaintiff in an action of trespass to real estate, commenced originally in the superior court, recovers less than twenty dollars as damages, he will be entitled to no costs, unless the judge shall certify, under St. 1862, c. 36, that the title to real estate was in fact concerned. *Heims v. Ring*, 352.

See PARTITION, 2.

## COVENANT.

See DEED, 1.

## CURRENCY.

Gold dollars of United States coin, if applied towards the payment of a debt, without any special contract as to the rate at which they are to be taken, cannot be treated as having any greater value than any other currency which is a legal tender for the payment of debts; and English sovereigns, if applied towards the payment of a debt, are to be computed according to the real par of exchange, that is, having reference to the gold coin of the United States. *Bush v. Baldrey*, 367.

## DAMAGES.

1. In an action to recover damages for a personal injury, the plaintiff may introduce evidence to show the kind and amount of mental and physical labor which he was accustomed to do before receiving the injury, as compared with that which he has been able to do since, for the purpose of aiding the jury to determine what compensation he should receive for his loss of mental and physical capacity. *Ballou v. Farnum*, 73.
2. If, for the purpose of staying a conflagration, a building has been blown up without right, the jury in estimating the damages should consider the circumstances under which the building and its contents were situated, and their chance of being saved, even though the same were not actually on fire; and should determine their value with reference to the peril to which they were exposed. *Parsons v. Pettingell*, 507.

## DEED.

1. If one who has conveyed land with a covenant to warrant and defend the title is vouched in by his grantee to defend a suit brought against him by one claiming an adverse title, he in his turn may vouch in his grantor, who conveyed the premises to him with a like covenant, to defend the same suit. *Chamberlain v. Preble*, 370.
2. One who has been duly vouched in to defend a title which he has covenanted to warrant and defend will be bound by the result of the suit, establishing the adverse title, although he did not appear therein, and although it was decided

- upon an agreed statement of facts, in which a fact was misstated, which if correctly stated would have defeated the adverse title, provided such statement of facts was agreed to in good faith and without collusion. *Ib.*
5. Proof that an attaching creditor had heard a report that his debtor had conveyed all his property to another, who in consideration thereof was to pay his debts, and that such person, upon being called on by the creditor, did not deny his responsibility, but promised to pay the sum due to the creditor, is not sufficient to require a finding that the creditor had actual notice of an unrecorded deed from his debtor to such person. *Richardson v. Smith*, 134.
  4. A grant by the town of Lynn of the use of the water of a stream flowing from a "great pond," and of the right to make sluices, and build a dam at the head of the stream in order to create a head of water, prior to the colony ordinance of 1641-47, and before any of the land bordering on the stream had been granted, vested a valid title in the grantee. *Berry v. Rad-din*, 577.
  5. A deed of a water privilege, having a lower and an upper dam, "also all the land which I the said grantor own that said first mentioned dam flows, (reserving all the wood except what stands on said dam,) together with the right to flow all the land that said dam as it now stands will flow; also all the land which the second mentioned dam flows, (reserving the wood,) together with the right to flow all the land that said dam as it now stands will flow," conveys the land which the dam would flow if in use, although at the date of the deed the dam was not in use, and the water flowed within the banks of the stream and through the waste way, as freely as if no dam had been there. *Morse v. Marshall*, 229.
  6. If the granted premises in a deed are described simply by courses and distances, and without reference to visible monuments, except on one side, where they are bounded on a new open street, and are further described as being lots marked on a plan which is referred to, and on the plan it appears that a considerable number of lots are laid down on one side of the street, and on the opposite side the land is marked "Ornamental Grounds" and "Play Ground," without any designation of how much land is to be so appropriated, there is no implied covenant that any land on the opposite side of the street shall be so appropriated, although the grantor owned the same. *Light v. Goddard*, 5.
  7. If a deed of a lot of land situated between R. and S. Streets in a city describes the granted premises by metes and bounds, and refers to a recorded plan for a full view and description thereof, and adds, "Said lot is approached from S. Street by a passage, laid down on said plan, together with all the buildings standing on the premises, and all rights of way, passage and drainage belonging to the above estate in said passage," and the passage from S. Street is laid down on the plan and is sufficient to afford access to the lot, the deed will not include, as appurtenant to the granted premises, a right to use another passage which is not laid down on the plan, leading to R. Street, and which is owned by the grantor; nor can such right be established by proof

that the grantor has laid a drain from the granted premises through such passage, or that he purchased the passage with the purpose of using it as a way to the granted premises, and for a time permitted the tenants of the granted premises to use it. *Parker v. Bennett*, 388.

3. A., B., C. and D. owned adjoining parcels of land extending to the low water line, at the north end of Boston, which is a headland. A straight line divided the land of A. from that of B., and another straight line, parallel to the former, divided the land of B. from that of C. The line between C. and D. was not parallel to the other lines, but diverged so that the land of C. grew wider as it approached the water. The legislature granted leave to A. to extend a wharf upon his land straight into the harbor, to a line fixed by the harbor commissioners; and on the same day granted leave to B. and C., respectively, to extend the wharves upon their lands to said commissioners' line; and the next year made a like grant to D. C. and D., by an indenture between themselves, agreed that the line between them should continue to the commissioners' line in the same direction with their line on the shore. Immediately after the legislative grants to B. and C., they respectively built a structure and drove piles on the assumption that the true line of division between them was a continuation, in a straight line, of the division line between them on the shore; thus leaving B.'s two lines parallel to each throughout their entire length. Upon a controversy arising between B. and C. twenty-five years afterwards, there being no evidence to show the form of the headland at that particular place, *Held*, that the projection of the line between them should continue in the same direction with that on the shore, and that B. was not entitled to have his premises expand as they approached the commissioners' line. *Winnisimmet Co. v. Wyman*, 432.

#### DEPOSITION.

Under Gen. Sta. c. 131, § 38, a commissioner specially appointed by a court in another state, under authority of the laws of that state, to take a deposition in this commonwealth, to be used in a suit pending in that court, is appointed under the authority of that state, and is qualified to administer an oath and to require the attendance of a witness in this commonwealth. *Commonwealth v. Smith*, 243.

See EVIDENCE, 9; PRACTICE, 6.

#### DOG.

The St. of 1864, c. 299, authorizing any person to kill an unlicensed dog wherever found, does not authorize the entry into the dwelling-house of another without his express or implied consent, for the purpose of catching and killing such dog, which has taken refuge there. *Kerr v. Seaver*, 151.

#### DOMICIL.

See EVIDENCE, 4; PRACTICE, 2.

DOWER.

See SEISIN.

EMBEZZLEMENT.

If bounty money received by a minor upon his enlistment as a soldier is delivered by him to another to be carried to his father, and is embezzled, an indictment for the embezzlement may, under Gen. Sts. c. 172, § 12, allege the ownership of the money to be in the father. *Commonwealth v. Norton*, 110.

EQUITY.

If no replication is filed by a plaintiff in equity, but the cause is set down for a hearing on the bill and answer, all the facts stated in the answer are to be taken as true, whether responsive to the averments of the bill or not. *Perkins v. Nichols*, 542.

See BOARD OF HEALTH.

ESTOPPEL.

In order to create an estoppel *in pais*, the declarations or acts relied upon must have been accompanied by a design to induce the party who sets up the estoppel to act upon them. *Andrews v. Lyons*, 349.

EVIDENCE.

1. In an action to recover damages for a personal injury, a physician who attended the plaintiff after he had been in the care of another physician for two weeks may be asked and testify what, so far as he can judge, had been the first physician's treatment, and in what respects it differed from his own; what effect, as far as he could judge, it had upon the plaintiff; and whether or not he saw any evidence that the plaintiff had been injured by his medical treatment. *Barber v. Merriam*, 322.
2. The statements of a patient to his physician as to the character and seat of his sensations, made for the purpose of receiving medical advice, are competent evidence in his favor, in an action to recover damages for a personal injury, even though such statements were not made till after the action was brought. *Ib.*
3. In an action to recover damages for an assault and battery committed by rioters, in taking the plaintiff from a private house and tarring and feathering him, the defendants cannot be allowed to put in evidence declarations of other persons in the crowd, before coming into the plaintiff's presence, and while on their way thither, showing an intention to put certain inquiries to him, but not to inflict personal violence upon him; although some of the defendants were then present. Nor can they be allowed to prove that the plaintiff made certain statements to one of the defendant's, in a conversation two hours before the assault upon him, and that the same were repeated to the crowd before they went to the house. *Stone v. Segur*, 568.
4. After proof of a man's declaration of his intention to leave a town, evidence is

- competent, upon the question of his domicile, to show that he was not there except occasionally and for short visits afterwards. *Wilson v. Terry*, 206.
5. Evidence of declarations of a committee of a religious society appointed to offer terms to a minister are incompetent evidence to prove the contract of the society, unless they were authorized by the society to make those declarations. *Johnson v. Trinity Church Soc.* 128.
  6. Evidence that a religious society voted "that for the six intervening Sabbaths from December 14th to February 1st the society will supply the pulpit, making their own selections and paying therefor whatever sum is just and proper, and the residue" to their minister at a certain rate per annum, and "that the committee be instructed to require an immediate answer to the foregoing proposition as a compromise," is incompetent for the purpose of proving that the contract for his services was to extend till February 1st. *Ib.*
  7. A minister cannot be allowed to prove his contract with a religious society by reading extracts from a sermon preached by him in their church, to the terms of which no open contradiction was made. *Ib.*
  8. If in a libel for divorce against a married woman on the ground of adultery, a servant has testified to seeing her on one occasion sitting in the lap of the man with whom the adultery is charged to have been committed, and he in reply testifies to facts showing that this was for an innocent purpose, and by the request of his wife, who had temporarily left the room, and she testifies to the same facts, they may be allowed to state, for the purpose of showing that they are referring to the same occasion, that on her return to the room, within two or three minutes, he remarked to her that the servant had been in. *Earle v. Earle*, 1.
  9. Depositions taken in 1678 before a judge of a court and certified by him and immediately afterwards recorded in the registry of deeds under a colonial statute authorizing the same to be done, although *ex parte*, are competent evidence to prove a prior grant of land by vote of a town, it being shown that the town records of that time have all been destroyed. *Berry v. Raduin*, 577.
  10. The truth of a magistrate's record of a criminal case within his jurisdiction and determined by him cannot be impeached, even in an action against him for fraudulently and corruptly altering the complaint and warrant after the warrant had been served. *Kelley v. Dresser*, 31.
  11. A written receipt for money, showing that in consideration thereof the signer of it agreed to discharge a suit in court against the payer upon the latter's paying all legal costs therein, cannot be varied by proof that the oral agreement was that nothing should be paid for costs that would go to the attorney *James v. Bligh*, 4.
  12. An office copy of a lost deed is competent secondary evidence thereof, in favor of the grantee, although the deed was executed by a husband and wife, to convey land owned by her in her own right, prior to 1855, and acknowledged by the husband alone. *Perkins v. Richardson*, 538.
  13. The entry of "neither party" in an action is not evidence of a settlement

or adjudication of the matters involved therein, and is no bar to a future action between the same parties and for the same cause. *Marsh v. Hammond*, 483.

14. If a witness, on looking at a memorandum made by him at the time, is able from it to testify to the delivery of goods, the testimony is admissible, though he has no present memory of the transaction, and the memorandum itself has been held incompetent. *Dugan v. Mahoney*, 572.
15. A party who has refused, at the trial of a case, to produce, on notice, a paper in his possession, cannot be allowed to introduce it in evidence, after secondary evidence of its contents has been introduced by the adverse party; nevertheless a new trial will not be granted on account of his having been allowed to introduce it in evidence under these circumstances, if it appears that the adverse party was not prejudiced thereby. *Kingman v. Tirrell*, 97.
16. One who puts in evidence a note with indorsements may show that the indorsements were not correct. *Ib.*
17. An action of tort which is submitted by the plaintiff to the jury solely upon the ground that the defendant forcibly prevented him from exercising certain rights is not supported by proof of a mere verbal prohibition on the part of the defendant. *Tucker v. Tarbell*, 131.

See ACTION, 4; COMMON CARRIER, 3; CONSPIRACY; DAMAGES, 1; INSOLVENT DEBTORS, 7-13; MILK; MORTGAGE, 3; PROMISSORY NOTES, 3; SUBORNATION OF PERJURY, 2; TRUST, 1; USAGE; WITNESS.

#### EXECUTORS AND ADMINISTRATORS.

1. A survivor of two joint debtors, who pays a joint debt after the expiration of the time when the creditor could have enforced it against the administrator of the estate of the deceased, does not thereby entitle himself to maintain a claim for contribution from such administrator, or to avail himself thereof in set-off, in an action brought against him by such administrator. *Lovell v. Nelson*, 101.
2. If a defendant pleads in set-off, the burden of proof is upon him to show that his claim filed in set-off is due from the plaintiff in the same right with the cause of action declared on in the writ; and if the plaintiff describes himself in the writ as administrator of the estate of a deceased person, and declares upon a promissory note signed by only one person, and running to him as administrator of that estate, this will not be sufficient to afford a presumption that his claim is in his representative capacity. *Ib.*

#### FALSE PRETENCES.

1. A person who obtains money upon a mortgage of personal property which he falsely represents that he owns may be convicted of obtaining money by false pretences, under Gen. Sts. c. 161, § 54. *Commonwealth v. Lincoln*, 233.
2. An indictment for obtaining money by false pretences may be sustained which simply alleges the obtaining of "forty-six dollars of the money of" the person

defrauded, without setting forth that it was in coin, or bank bills, or United States treasury notes. *Id.*

3. An indictment which alleges, in proper form, that the defendant falsely represented that he owned certain personal property, with intent to obtain a loan of certain money from another, and that he offered to mortgage the same as security for the money, and that such other person, believing the representations to be true, by reason thereof lent the money to the defendant, in consideration of the mortgage, sufficiently shows that the money was lent by reason of the false pretences; and the averment that it was in consideration of the mortgage is not inconsistent therewith. *Id.*
4. To obtain money of another by falsely representing to him that on a previous occasion he had omitted to return the proper change to the person making the representation, and thereby inducing him to correct the supposed mistake, is not punishable criminally under Gen. Sta. c. 161, § 54. *Commonwealth v. Norton*, 266.

#### FERRY.

See COMMON CARRIER, 2, 3; CORPORATION, 1, 2.

#### FINDER OF PROPERTY.

A stranger in a shop who first sees a pocket-book which has been accidentally left by another upon a table there is not authorized to take and hold possession of it, as against the shop-keeper. *McAvoy v. Medina*, 548.

#### FIREWARD.

Under Gen. Sta. c. 24, § 5, one fireward has no more authority, acting alone, than any other person, to direct the destruction of a house to prevent the spreading of a conflagration, although it may be impossible for the other firewards, or the other officers named in the statute, to get to the place where the occasion for action upon the subject arises. *Parsons v. Pettingell*, 507.

#### FRAUD.

1. False and fraudulent representations that a particular kind of security, which is worthless, is selling in the market at a given price, accompanied by the exhibition of a newspaper containing false quotations thereof, will entitle a purchaser to rescind his contract. *Manning v. Albee*, 520.
2. An owner of goods who has been induced by fraud to sell them and accept a note on time with worthless securities therefor may replevy the same without returning the note and securities, if the purchaser cannot be found; and the action will not be defeated by his afterwards demanding payment of the note, at its maturity. *Id.*

#### FRAUDS, STATUTE OF.

1. A parol promise to pay to another a portion of the profits made by the promisor in a purchase and sale of real estate is not within the statute of frauds and, if founded upon a sufficient consideration, will support an action. *Trowbridge v. Wetherbee*, 361.

2. No action lies upon an oral promise by a father to pay his minor son's debt, not contracted for necessities, although the promise was made in consideration of the creditor's forbearing, at the father's request, to demand the same of the son. *Dexter v. Blanchard*, 365.
2. The secretary of a religious society wrote to a minister informing him that the society had voted on the 1st of January to offer to employ him for one year from that date, for a sum in gross. He accepted the offer, stipulating however that the year should begin on the 1st of February, and the payments be made quarterly from that date. In December following the society passed a vote, which was duly entered on their records and attested by their secretary, reciting that on the 1st of October they "were not indebted to him in the least, and would not become so indebted to him by the terms of the agreement until November following." *Held*, that there was a sufficient memorandum, within the statute of frauds, of a contract extending to the 1st of February. *Johnson v. Trinity Church Soc.* 123.

### FRAUDULENT CONVEYANCE.

See ATTACHMENT, 1.

### GRANT.

See DEED.

### HOMESTEAD.

1. An estate of homestead is not necessarily limited to that portion of a dwelling-house which is occupied by the family of the owner; but it may exist and be continued in the whole of a house, some rooms of which are let to tenants. *Mercier v. Chace*, 194.
2. An assignment of dower in a part of a dwelling-house will not prevent a widow from claiming an estate of homestead in the residue of it. *Ib.*
2. Making and recording a declaration, under Gen. Sts. c. 104, § 2, and beginning to build a house upon the land mentioned in such declaration, will not entitle one to an estate of homestead therein, until he actually occupies the same as a residence; and the fact that several months before making such declaration he had for a short time and for a temporary purpose occupied a house then standing upon the land, is immaterial. *Lee v. Miller*, 37.

### HUSBAND AND WIFE.

A claim against a husband for necessities furnished to his wife during the time while she was prosecuting a libel for divorce is not discharged by a decree of court granting the divorce and allowing alimony to her for her past and future expenses; although the person who furnished the necessities was her father, and the libel for divorce was prosecuted under his direction. *Dowe v. Smith*, 107.

See MARRIED WOMAN PROMISSORY NOTES, 1; CONTRACT, 8.



## INDICTMENT.

1. In an indictment under Gen. Sta. c. 160, § 22, for robbery, being armed with a dangerous weapon, and wounding or striking the person robbed, it is not necessary to aver or prove that the wounding or striking was done with the dangerous weapon. *Commonwealth v. Mowry*, 20.
  2. It is a sufficient averment of striking, under the above statute, to set forth that the defendant, being so armed, "the said A., in and upon the face and head of the said A., then and there did strike and wound." *Ib.*
  3. Under a complaint dated "August 30, 1865," charging the commission of a continuing offence "on the first day of June in the year of our Lord one thousand eight hundred and sixty-five, and from that day to the day of the date of this complaint," evidence may be introduced covering the whole time between the first day of June and the date of the complaint. *Commonwealth v. Walton*, 238.
  4. If a complaint charges the keeping of a "tenement or shop" used for the illegal keeping and sale of intoxicating liquors, the objection that this charge is bad, because made in the alternative, is merely formal, within the meaning of St. 1864, c. 250, § 3, and must be taken before a judgment has been rendered in the original trial of the complaint. *Ib.*
- See ADULTERY; CONSTITUTIONAL LAW, 3; EMBEZZLEMENT; FALSE PRETENCES: INTOXICATING LIQUORS; SUBORNATION OF PERJURY.

## INSOLVENT DEBTORS.

1. A judge of probate and insolvency has no legal authority to expunge a claim which has been duly proved and allowed before him against the estate of an insolvent debtor, at a meeting subsequent to that at which the claim was proved, and without the consent of the creditor who proved it. *Hall v. Marsh*, 563.
2. An assignee of an insolvent debtor may keep accounts and memoranda of his doings as assignee in blank leaves of books of account belonging to the estate; and after settling his final account and distributing all the estate that has come to his hands, in pursuance of the order of court, may retain his receipts, vouchers and memoranda for his account, and may cut out such blank leaves, before delivering the books of account to his successors. *Hoard v. Bassett*, 213.
3. One who is duly charged with having fraudulently received, concealed, embezzled and conveyed away property belonging to the estate of an insolvent debtor, may, under Gen. Sts. c. 118, § 107, be examined in the court of insolvency on oath, touching the same, and required to disclose all such matters as may not tend to criminate him. *Sawin v. Martin*, 439.
4. If a discharge in insolvency is pleaded in defence to an action upon a promissory note, the plaintiff may reply that the defendant's estate paid less than fifty cents on the dollar upon the debts proved, and that a majority in number of his creditors who had proved their claims did not assent to the granting of the certificate of discharge. *Kelman v. Sheen*, 566.
5. In an action by the assignees of an insolvent debtor to recover back instal

ments of money paid by the debtor, by way of preference, to a preëxisting creditor, at several times after an urgent demand of payment by the latter, a verdict for the defendant will not be set aside because the judge refused to rule, as matter of law, that the debtor's failure to pay the note at or about the time he was called on to do so, and his continued failure to pay it, constituted insolvency, and were sufficient "reasonable cause," within the meaning of the statute, to lead the creditor to believe him insolvent; or to rule that the plaintiffs must satisfy the jury that the defendant had reasonable cause to believe that the debtor intended to prefer him. *Kingman v. Tirrell*, 97.

6. It is not a fraud upon creditors nor an act in violation of the insolvent laws for an insolvent debtor to give new notes in exchange for notes dated before the passage of St. 1855, c. 238, for the purpose of extinguishing his old debts and thus entitling himself to hold his homestead; but in such case if the debtor does not disclose his purpose and assigns a different reason for the exchange, and the creditors accept the new notes without understanding that their rights will thereby be impaired, the new notes will not, while in the hands of original parties, be held to extinguish the old ones, but will be considered merely as renewals of them, and therefore the debtor will have no right to a homestead as against them. *Tucker v. Drake*, 145.
7. Evidence that an insolvent debtor, a few months before the making of a conveyance which is alleged to have been fraudulent, represented to certain of his creditors that he should not be able to pay his debts to them at maturity, is admissible in favor of his assignees, in an action brought by them to set aside the conveyance. *Marsh v. Hammond*, 483.
8. Evidence that a person cannot write very well, and that his nephew, who had been his confidential clerk for several years, was in the habit of writing letters for him, is sufficient to authorize the introduction in evidence of letters appearing to be on his business, and written in his name by such clerk, for the purpose of proving his insolvency. *Ib.*
9. If an insolvent debtor has testified, in a writ of entry brought by his assignees to set aside a conveyance of real estate made by him on the day before removing with a stock of goods out of the Commonwealth, that the conveyance was not made to defraud creditors, and that he had no such intent in removing with his goods from the Commonwealth, letters written by him or by his authority shortly after reaching the place of his destination, and tending to show that he had such fraudulent intent, are admissible in evidence for the purpose of contradicting him. *Ib.*
10. If the tenant in such writ of entry has testified that after he was summoned to appear as a witness before the court of insolvency, and before obeying the summons, he requested and had a meeting with the insolvent debtor out of this commonwealth, and there received from him a letter addressed to another person, and that he did not know and had no belief whether it was sealed or unsealed, or whether he saw or heard or knew the contents of it, and his appearance and mode of answering are such as to make the weight and credibility of his testimony, in the opinion of the presiding judge, a question for the

jury, and there is evidence tending to show that he delivered the letter to the person to whom it was addressed, and its contents, if known by the tenant, had a tendency to prove the alleged fraud on his part, the question whether or not he knew them may be submitted to the jury. *Ib.*

11. Upon the issue whether a debtor who asked an extension from his creditors at a particular time was then insolvent and had reasonable cause to believe himself so, evidence is incompetent to show that persons engaged in the same line of business at that time generally obtained an extension; that it was the general understanding among the trade that asking for an extension at that time was no sign of inability to pay debts; and that all persons in that line of business either temporarily suspended payment or asked for an extension at that time. *Vennard v. McConnell*, 555.
12. The rule of law by which the question is determined whether a debtor was solvent or insolvent at a particular time is not affected or modified by any general embarrassment of the operations of trade, arising from the existence of a civil war, or by the fact that all persons in the same line of business were unable to pay their debts at maturity. *Ib.*
13. If various issues have been submitted to a jury, on an appeal from the decision of a judge of insolvency refusing to grant a certificate of discharge to an insolvent debtor, and, upon one of them which was submitted under instructions to which no exceptions were taken, they have found a fact which will deprive the debtor of his discharge, a new trial will not be granted even if the instructions were erroneous concerning other issues, upon which they also found adversely to the debtor. *Ib.*

See PRACTICE, 4; PROMISSORY NOTES, 1.

### INSURANCE.

1. If a policy of insurance on the life of a married man is made payable to his wife, and she dies before him, leaving children, the administrator of her estate, upon receiving the amount of the policy after the death of the husband, will hold it, under the statutes of Massachusetts, if no other trustee is appointed, for the benefit of the children; and the administrator of the husband's estate has no interest therein. *Swan v. Snow*, 224.
2. In an action upon a policy of insurance on a theatre, which contains this clause, in connection with the description of the property insured: "This policy not to cover any loss or damage by fire which may originate in the theatre proper," the burden of proof is on the plaintiff to show a loss not originating in the theatre proper. *Sohier v. Norwich Fire Ins. Co.* 336.
3. In such case, if a brick wall of the building becomes so heated from without as to set fire to the wood-work within the theatre, this is not a fire originating in the theatre proper, within the meaning of the policy. *Ib.*
4. If it is provided in by-laws which are a part of a contract of insurance that "when any property shall be alienated, by sale or otherwise, the policy thereupon shall be void," and the insured, after mortgaging the property and assigning the policy with the consent of the insurers, conveys the equity of

redemption without such consent, the policy thereupon becomes void. *Lawrence v. Holyoke Ins. Co.* 387.

5. After a decree of this court, under *Sts.* 1862, c. 181, and 1863, c. 249, ratifying an assessment by a mutual insurance company upon its members who at the time of the making thereof were liable to assessment, one whose policy had terminated within two years prior to the making of the assessment cannot object, in an action brought by the company to recover the amount assessed upon him, that the absolute funds of the company had not been exhausted; that he was not concluded by the order of the court relative to the assessment; or that, if liable at all, it was for less than the amount assessed upon him. *Hamilton Mut. Ins. Co. v. Parker*, 574.

See CONSTITUTIONAL LAW, 2.

### INTOXICATING LIQUORS.

1. A complaint alleging that the defendant was a common seller of intoxicating liquors "on the third day of April in the year of our Lord eighteen hundred and sixty-five, within six months last past," can only be supported by proof that he was a common seller on said third day of April. *Commonwealth v. Traverse*, 260.
2. A license granted under *St.* of U. S. of 1862, c. 119, does not authorize the sale of intoxicating liquors in this commonwealth, in violation of the statutes of this commonwealth. *Commonwealth v. Keenan*, 262.
3. If the defendant on the trial of an indictment against him for selling intoxicating liquors in violation of the statutes of this commonwealth, puts in evidence a license, under *St.* of U. S. of 1862, c. 119, authorizing him to sell such liquors at retail, and granted before the act charged against him in the indictment, and in force at that time, that fact may be taken into consideration by the jury, in determining whether or not he is guilty. *Ib.*

See INDICTMENT, 3, 4; NUISANCE.

### JUDGMENT.

- A judgment in an action for the conversion of a tree is not conclusive evidence of title in a writ of entry to recover the premises on which the tree stood, although accompanied by proof that the only question litigated in the former suit was in regard to the title. *Johnson v. Morse*, 540.

See EVIDENCE, 13.

### JURISDICTION.

- If a vessel has been built for the United States for the purpose of being used as a floating light, under an agreement to construct and equip her according to certain specifications annexed, and to the satisfaction and approval of an agent of the United States, and to deliver her in this commonwealth, for a gross sum to be paid by the United States to the builder after her completion, and the builder has completed the same, and received the contract price, and the title

to her has vested in the United States, subject to the lien, and possession has been taken of her by the United States, and the spars and rigging been put up, and the lanterns put on board and prepared for use, a lien upon her cannot be enforced in the courts of this commonwealth upon proceedings afterwards commenced, for timber which has been used in her construction. *Briggs v. Light-Boats*, 157.

See PROBATE COURT.

## JUROR.

See PRACTICE, 8.

## LEASE.

- 1 An action by a lessee against a lessor of a tenement to recover damages for the breach of an agreement by the latter to keep the premises in good condition and repair, whereby water flowed into the tenement and compelled the plaintiff to vacate it, is not defeated by proof of negligence on the part of the lessee which contributed to the injury complained of, provided the defendant also was guilty of negligence in failing to keep the premises in repair. *Flynn v. Trask*, 550.
- 2 In such action, the defendant has no reason to complain of instructions that "he was bound to do all that ordinary sagacity, prudence and foresight could do to keep the premises in good repair and condition, and that if the injury was owing to this want of repair and could have been prevented by such ordinary sagacity, prudence and foresight, then he would be liable." *Ib.*

## LICENSE.

If the owner of land for a valuable consideration orally licenses another to cut off within a certain time the trees standing upon it, and afterwards executes an absolute deed of the land to a third person, such deed, when made known to the licensee, will operate as a revocation of the license, although the grantee had knowledge of it. *Drake v. Wells*, 141.

## LIMITATION.

See EXECUTORS AND ADMINISTRATORS, 1.

## LIQUIDATED DAMAGES.

If a bond is given in a certain sum "mutually agreed upon as liquidated damages," with condition to pay off a mortgage debt within a certain time upon land conveyed to the obligor, and to pay the interest thereon semi-annually until the principal is paid, and to pay all taxes assessed on the premises and to keep the buildings insured against fire to a certain amount, and the sum provided to be paid is referred to only in the early and formal part of the bond, and is several times as great as the semi-annual instalments of interest, it is to be treated as a penalty and not as liquidated damages. *Fisk v. Gray*, 132.

LORD'S DAY.

An action of contract cannot be maintained for the price of a horse sold on the Lord's day, although the purchaser keeps him afterwards; but the remedy is by an action of tort in the nature of trover. *Ladd v. Rogers*, 209.

MAGISTRATE.

See EVIDENCE, 10.

MARRIAGE AND DIVORCE.

A divorce obtained in Illinois by a citizen thereof from his wife, for the cause of desertion, upon notice to her by publication in a newspaper in the manner prescribed by the statutes of that state, is valid, although she was then living in Massachusetts under an agreement by which, after reciting their separation, he promised to pay her a certain weekly sum as long as she should remain single, and although she had no actual notice of his proceedings for a divorce and was not in Illinois during the pendency thereof; and it is not competent for her, in a libel for divorce brought by her in this commonwealth, to offer evidence that he obtained the decree of divorce there by fraud, and upon facts which would not entitle him to a divorce here. *Hood v. Hood*, 196.

See EVIDENCE, 8.

MARRIED WOMAN.

1. In an action upon a promissory note given by a married woman, while living with her husband, the burden of proof is upon the plaintiff to show such facts as will make her liable thereon. *Tracy v. Keith*, 214.
2. If land is devised to a person, to have and to hold the same to the sole, separate and exclusive use of a married woman, her heirs and assigns forever, with a provision that she may reside thereon if she chooses during her life, and in case she should leave it then that the trustee may "lease or sell or make such other disposition of the premises, or any part thereof, as she may in writing authorize;" and the land is afterwards conveyed by such trustee to the woman and her husband; a conveyance thereof by her and her husband will vest a valid title in the grantee. *South Scituate Savings Bank v. Ross*, 442.
3. Land owned by a married woman in her own right might be conveyed, prior to 1855, in this commonwealth, by a deed, in which she joined with her husband in the granting part thereof, although her husband alone made the covenants contained therein, and the last clause of which stated that she executed the same "in relinquishment of dower." *Perkins v. Richardson*, 538.
4. The St. of 1862, c. 198, requiring married women who do business on their separate account to file a certificate in order to secure their property from their husband's creditors, applies to furniture used in a boarding-house kept by a married woman. *Chapman v. Briggs*, 546.

See HUSBAND AND WIFE; TRUST, 2.

MASTER AND SERVANT.

If, in an action to recover damages for a personal injury received in consequence

of the neglect of the defendants' servant, there is any evidence tending to show that the person whose negligence is complained of was not under the control of the defendant, but was employed by one who had entered into an entire contract with the defendant to do certain work for a stipulated sum, so that the legal relation of master and servant did not exist between them, this court will not, upon a report of the case, set aside a verdict for the defendant, although the weight of the evidence may appear to have been in favor of the plaintiff. *Forsyth v. Hooper*, 419.

See NEGLIGENCE.

#### MECHANIC'S LIEN.

1. If labor and materials have been furnished and used in the erection of a building, under an entire contract, with no stipulation for any separate price for either, and there is no mechanic's lien for the whole, there can be none for any part. If extra labor, however, has been performed, a lien for it may be enforced. *Mulrey v. Barrow*, 152.
2. A lien may be enforced for labor performed in the erection of a house under the employment of one who has agreed with the owner of land to erect the house thereon, and to pay and discharge all claims for labor and materials furnished and used in the erection thereof, so that there shall be no liens upon the premises. *Ib.*
3. If labor and materials have been furnished and used in the erection of a building, and a payment has been made on general account, without discrimination as to whether the same should be applied towards the price of the labor or the price of the materials, so that it is impossible to determine how much remains due for the labor or for the materials separately, and there is no mechanic's lien for the whole, there can be none for any part. *Driscoll v. Hill*, 154.
4. No mechanic's lien exists for labor performed by the owners of a planing-mill in sawing and planing lumber in their mill, with no agreement between them and their employer as to the use to which the lumber shall be put; although it is in fact afterwards used in a building which he is erecting for another person under a contract. *Bennett v. Shackford*, 444.

#### MILK.

A certificate of the result of an analysis of milk, by a sworn inspector appointed under St. 1864, c. 122, is admissible in evidence in a criminal prosecution under that statute, provided he also testifies at the trial to the same facts which are stated therein; and in such case the admission of the certificate before he testifies furnishes no ground for a new trial, after a verdict of guilty. *Commonwealth v. Waite*, 264.

See CONSTITUTIONAL LAW, 4.

#### MORTGAGE.

1. If land which is subject to a mortgage is afterwards sold with full covenants of warranty in two different lots to different purchasers at different times, and

the mortgagee afterwards enters upon both of these lots for the purpose of foreclosure, and the foreclosure becomes absolute as to the lot last sold, the owner of the lot sold first, upon a bill seasonably brought, may redeem upon paying the balance due upon the mortgage debt after deducting the full value of the other lot, with the buildings thereon; and it is immaterial that the buildings were erected after he had acquired his title. *George v. Wood*, 41.

2. In such case the balance due at the time when the foreclosure of the lot last sold became absolute should be ascertained, and interest computed on the same thereafter. *Ib.*
3. The presumption of payment of a mortgage debt in favor of a mortgagor, who has been in uninterrupted possession of the mortgaged premises for twenty years, is not conclusive; but parol evidence, if relied upon to control it, should clearly show some positive act of unequivocal recognition of the debt within that time. *Cheever v. Perley*, 584.
4. In a suit to foreclose a mortgage which the wife of the mortgagor has signed for the purpose of releasing dower, it is not necessary to join her as a defendant, in order to defeat her inchoate right of dower in the equity of redemption. *Pitts v. Aldrich*, 89.
5. If mortgaged personal property is delivered to and kept by an agent of the mortgagee, this is equivalent to a delivery to and possession by the mortgagee himself. *McPartland v. Reed*, 231.

#### NEGLIGENCE.

One who is employed by a dealer in lumber to deliver lumber upon an unfinished bridge to sub-contractors who have undertaken to build the wooden portion thereof may recover damages against the contractors who have undertaken to build the entire superstructure, for an injury sustained by him while so delivering lumber, through a defect in the iron-work of that portion of the bridge which has been completed. *Curley v. Harris*, 112.

See LEASE, 1; MASTER AND SERVANT.

#### NUISANCE.

Keeping and maintaining a tenement used for the illegal keeping of intoxicating liquors may be proved by evidence of repeated illegal sales in the tenement, while it was fitted up as a bar-room. *Commonwealth v. Greenen*, 241.

See BOARD OF HEALTH.

#### OFFICER.

If an officer in serving a warrant for larceny takes from the defendant the goods alleged to have been stolen, and the defendant is discharged upon the complaint, it is the duty of the officer to return the goods; and if the person arrested owns the same and demands their return, and the officer refuses to give them up, he is liable for a conversion of the same; and he will not be excused by the fact that afterwards the complainant in the criminal process, not being the owner of the goods, has nevertheless obtained judgment against him,



upon his default, for their conversion, and taken them away from him on execution. *Fitzgerald v. Jordan*, 128.

### PARTITION.

1. A decree of partition, in the probate court, setting off a portion of the real estate of a deceased person to his daughter, is conclusive upon her husband, when finally confirmed and established according to Gen. Sts. c. 136, if he assents thereto, and in the petition represents that she is entitled to a share of the estate in her right as an heir at law; and such partition will vest in her a valid title as against him and his heirs, although before the partition was made her title had become vested in him by mesne conveyances. *Carpenter v. Green*, 26.
2. If partition is decreed, upon a petition for partition, against the opposition of the respondent, the costs to be taxed against the latter, under Gen. Sts. c. 136, are limited to the costs accruing between the filing of the answer and the rendering of the verdict. *Powell v. Jenny*, 104.

See PROBATE COURT.

### PAYMENT.

See MORTGAGE, 3.

### PLEADING.

1. A declaration alleging the conversion of boots is not supported by proof of a conversion of unfinished boots, in process of manufacture. *Fitzgerald v. Jordan*, 128.
2. One who has been ready and offered to perform services according to the terms of a special contract may, if prevented by the adverse party from performing them, recover the amount due to him, under a declaration upon an account annexed. *Johnson v. Trinity Church Soc.* 123.
3. Illegality of a contract which is the subject of an action cannot be relied on in defence, unless it appears by the declaration or is specially pleaded in the answer. *Goss v. Austin*, 525.
4. If on a plea of tender in a police court the money is not actually put into the custody of the court, but is brought in by the defendant and offered to and until the rendition of judgment always kept ready for the plaintiff, who refuses to take it, putting his refusal on the sole ground that he claims more, and after judgment for the plaintiff the defendant appeals and pleads the same tender in the superior court, and pays the money to the clerk, it is too late for the plaintiff to object to the defendant's irregularity, in omitting to put the money into the custody of the police court. *Storer v. McGaw*, 527.
5. If an action to recover a tax upon a corporation, assessed under St. 1864, c. 208, is brought by the treasurer of the Commonwealth in his own name, instead of in the name of the Commonwealth, as required by § 14 of that statute, and the declaration contains no averment that the treasurer was by law authorized to commence the action in his own name, the defendants may take

advantage of the objection, and defeat the action, although no demurrer to the declaration is filed, and the answer contains neither a special nor a general denial of the averments of the declaration. *Oliver v. Colonial Gold Co.* 283.

### POLICE COURT OF BOSTON.

The police court of Boston has jurisdiction of a personal action in which the damages demanded are less than one hundred dollars, if the plaintiff and defendant each has his usual place of business in Boston, and the writ is served in Boston, and each party lives in a town in which no police court has been established. *Aspinwall v. Cushman*, 405.

### POOR DEBTORS.

1. If the examination of a debtor on his application to take the poor debtor's oath is adjourned to another day, and he is ordered to produce certain books of account at the adjourned hearing, and he duly appears at the adjourned hearing within the hour but without the books, and then goes away to get the books without any new request or express consent of the creditor or magistrate, and does not return till shortly after the expiration of the hour, and his absence is not unreasonably or unnecessarily long for that purpose, the magistrate may retain jurisdiction of the case and pursue the examination and administer to him the oath, although the creditor objects thereto. *Toll v. Merriam*, 395.
2. If a debtor who has been arrested on an execution and entered into a recognizance under Gen. Sta. c. 124, § 10, appears by attorney but not personally at the time and place fixed for his examination, the magistrate may entertain a motion of the attorney for an adjournment of the case to another time within thirty days from the day of the arrest, and may hold the motion under consideration till after the expiration of the hour, and the departure of the creditor's attorney, and then grant the same; and may discharge the debtor at such adjourned hearing. *Mann v. Mirick*, 29.

### PRACTICE.

1. A new trial will not be granted merely because the instructions to the jury were expressed in an abstract form, if the law was stated correctly and it does not appear probable that the jury were misled. *Wilson v. Terry*, 206.
2. If on a question of domicile instructions were given to the jury in the form of general propositions, which, when taken together, correctly express the law of the case and contain all necessary explanations and qualifications, a new trial will not be granted for the reason that a single passage, taken abstractly, may have been erroneous. *Adams v. Nantucket*, 203.
3. The omission of the judge to reduce to writing his instructions in a criminal case and file them with the clerk before the jury retire to deliberate on their verdict is no ground for setting aside a verdict of guilty, if the defendant did not request him to do so and has sustained no injury by the omission. *Commonwealth v. Barry*, 263.
4. If various issues have been submitted to a jury, who after agreeing upon

some of them and failing to agree upon others have improperly separated without leave of the court, their findings upon those issues in regard to which they agreed will not be set aside, if it appears to the court that their failure to reach a verdict on the others did not result from inability to agree on any element common to all the issues. *Vennard v. McConnell*, 555.

5. Upon the report of a case for the determination of the full court whether the jury were warranted in finding the verdict which was rendered therein, the weight of the evidence will not be considered, but the only question is whether there was any evidence upon which the jury could legally have found their verdict. *Forsyth v. Hooper*, 419.
  6. If a commission duly issued in another state to take a deposition in this commonwealth directs the oath to be administered by causing the witness to lay his hand upon and kiss the gospels, the oath may be administered in that form, although the Gen. Sta. c. 131, § 8, prescribe a different form to be used here. *Commonwealth v. Smith*, 243.
  7. If the defendants in an action brought in favor of a town have filed an affidavit of merits at the first term, the objection that the action was brought without the authority of the town cannot be taken after the expiration of that term, even though they have leave to file their answer in the vacation. *Walpole v. Gray*, 149.
  8. Two or more persons who are joined as plaintiffs or defendants in civil actions have only the right collectively to challenge two jurors, under St. 1862, c. 84; and not to challenge two apiece. *Stone v. Segur*, 568.
- See COMMON CARRIER, 7; EVIDENCE, 15, 17; PLEADING, 4; PROBATE COURT; RECOGNIZANCE, 1.

#### PRINCIPAL AND AGENT.

An agent's authority to collect money for his principal is not revoked by the mere appointment of another agent with like authority; and a payment by the debtor to the first agent, after receiving notice of the appointment of the second, will discharge the debt, if there is no other evidence of a revocation of the first agent's authority. *Davol v. Quimby*, 208.

#### PROBATE COURT.

If proceedings for the partition of the estate of a deceased person have been lawfully commenced in the probate court, and that court has assumed jurisdiction and issued a warrant to commissioners to make partition, the shares or proportions of the respective parties not being in dispute nor appearing to be uncertain, that court may retain its jurisdiction, although subsequently the shares or proportions of the respective parties do appear to be uncertain. *Potter v. Hazard*, 187.

See ACTION, 3.

#### PROMISSORY NOTES.

1. An indorsement of a promissory note by a husband to his wife will not vest in her a valid title to it; and if he has afterwards gone into insolvency, and then

died, and the assignee in insolvency has had no knowledge of the existence of the note, and has never authorized an action to be brought thereon, she cannot maintain an action to recover the same as administratrix of his estate. And proof that the debtor duly filed schedules of his assets and creditors, which have since been lost, and took the debtor's oath required by law, is not sufficient to show that the assignee had such knowledge. *Gay v. Kingsley*, 345.

2. If the answer, in an action upon a promissory note, dated more than six years before the commencement of the action, simply sets up the statute of limitations, and it is in issue whether payments have been made within six years, the defendant cannot be allowed, in corroboration of his own testimony that no such payments have been made, to prove that the note was without consideration. *Davidson v. Delano*, 523.
3. In an action by an indorsee against the maker of a promissory note, the mere fact of indorsements of payments within six years, made in the handwriting of the payee, is not competent evidence to prove such payments. *Ib.*

See INSOLVENT DEBTORS, 6.

# RAILROAD.

1. It is no defence to an action by a passenger against a carrier to recover damages for an injury sustained through their negligence, that the negligence or trespass of a third party contributed to the injury, although such third party acted entirely independently of the carrier. *Eaton v. Boston & Lowell Railroad Co.* 500.
2. The above rule is not affected by *St.* 1851, c. 128, authorizing certain railroad companies, of which the defendants were one, to use a common track, and regulating the manner of such use and their liability for accidents upon the same. *Ib.*
3. A street railway corporation has no power to mortgage its franchise, road or property without legislative authority; and under *St.* 1864, c. 229, a mortgage by such corporation of substantially all of its property, without such authority, is wholly void. *Richardson v. Sibley*, 65.
4. The power of making regulations concerning the removal of snow from the tracks of street railways is given by law exclusively to the mayor and aldermen of the cities, and the selectmen of the towns, in which such tracks are located; and in the exercise of this power they may prohibit the removal of snow by the railway company at any and all times and places when in their judgment the public interests involved may require it. *Union Railway Co. v. Mayor, &c. of Cambridge*, 287.
5. It is no objection to an order of the mayor and aldermen of a city regulating the removal of snow from the track of a street railway, that it requires and permits such removal by the railway company only when it is allowed, and in a manner to be designated, by the superintendent of streets, or other officer having charge of the condition or repair of streets. *Ib.*
6. The conductor of a street railway car may exclude or expel therefrom a per

son who by reason of intoxication or otherwise is in such a condition as to render it reasonably certain that by act or speech he will become offensive or annoying to other passengers therein, although he has not committed any act of offence or annoyance. *Vinton v. Middlesex Railroad Co.* 304.

See COMMON CARRIER, 4-7.

#### RATIFICATION.

See CORPORATION, 2.

#### RECOGNIZANCE.

1. The superior court have authority to allow a commissioner, specially appointed to take a recognizance from a person under indictment, to file an amended return thereof, setting forth a different contract, three years after the filing of his original return, after the parties to the recognizance have been defaulted, and after an action has been commenced thereon : and such action may thereupon be maintained by proof of such amended return. *Commonwealth v. Field*, 488.
2. If a person under indictment for assault, abduction and kidnapping has been committed to jail upon a *mittimus* which contains an order for his commitment for failing to recognize with sureties to answer to an indictment for kidnapping, a recognizance afterwards taken with condition that he shall answer to an indictment against him for assault, abduction and kidnapping is valid ; although after the taking of the recognizance but before the sureties therein are defaulted the charge of kidnapping is abandoned. *Ib.*
3. Under the Gen. Sta., the superior court have authority to require a prisoner who has filed exceptions after a verdict of guilty has been returned against him, to enter into a recognizance to appear from term to term in that court, to answer to the indictment. *Ib.*

#### RELEASE.

1. If one who has received a personal injury through the negligence of another signs a paper acknowledging the receipt of a small sum of money in full for his damages, a subsequent action cannot be maintained to recover damages for the same injury, unless his signature to the receipt was procured through mistake or fraud ; and if instructions to this effect are requested, and the jury are simply instructed that if they are satisfied that the parties "fairly settled the claim it is sufficient, and the amount received in the settlement is not material to its validity as a settlement," a verdict for the plaintiff will be set aside. *Curley v. Harris*, 112.
2. A., having executed to B. two mortgages of land to secure certain promissory notes, assigned to B. as additional security certain policies of insurance, from mutual companies, upon the buildings, and afterwards conveyed the equities of redemption to B., who received the same in full discharge of the notes. A. also at the same time executed a release of all claims against B., and especially of any claim which he had or might have, growing out of the mortgages.

or the debts secured thereby, or any matter or thing connected therewith. Subsequently B. received from the insurance companies certain sums for return premiums upon the expiration of the policies. *Held*, that the release by A. barred his right to recover these sums of B. *Merrifield v. Baker*, 48.

RIOT.

See EVIDENCE, 3.

ROBBERY.

See INDICTMENT, 1, 2.

SALE.

1. If a dealer in fish has agreed to sell to a purchaser all of a certain kind that he should pack during a season, at the market prices, and, after a sale and delivery of a considerable quantity, executes and delivers to him a bill of parcels of a quantity more, describing the same, and inserting the prices which they have fixed, upon or in anticipation of the arrival of the fishing vessels, and accordingly fish of the same kind described in the bill of parcels, though less in quantity, are stored in warehouses of the vendor, under direction of the purchaser, and the warehouses are filled with them, and the fish prior to being stored are inspected, marked and made ready for immediate shipment, the sale is complete and the title passes, even as against subsequent purchasers, although the quantity thus stored is not then ascertained nor the bill settled. *Ropes v. Lane*, 591.
2. If, under such a general agreement as above recited, all the fish on hand at a particular time, in warehouses or on a wharf, are exhibited to the purchaser, and the prices for the particular kinds have been fixed, upon or in anticipation of the arrival of the fishing vessels, and the fish have been inspected, marked and made ready for immediate shipment, and they are all delivered to the purchaser with intent to complete the sale, and it is agreed that they shall be stored where they are for a time by the vendor at a particular price, the sale is complete and the title to the whole of the fish passes, as between the parties, although by mistake bills of parcels which are executed to exhibit the transaction omit to include a portion of them, and the bills are not then settled. *Id.*

SEISIN.

If at the same time when a deed of land is received the grantee mortgages it to a third person for the purpose of procuring money to enable himself to obtain his deed, and as a part of the same transaction, his seisin is only instantaneous, and the mortgage will bar his wife's dower, although she does not sign it *King v. Stetson*, 407.

SET-OFF.

See EXECUTORS AND ADMINISTRATORS, 1, 2.

## SHIP.

1. A bill of lading signed by the master of a vessel by request of the charterers' agent is not conclusive evidence of the course of the voyage which the master is to pursue, if the charter contains mutual stipulations as to the course of the voyage and the mode in which the vessel is to be employed, and there are other circumstances to show that the bill of lading was not intended to have this effect. *Cobb v. Blanchard*, 409.
2. If a vessel is chartered for a voyage from a port in Sicily to Boston, with the privilege of using a second port in Sicily within certain lay days, which are fixed, and on arriving at a port in Sicily the master takes in part of a cargo and signs a bill of lading which is prepared for him by the plaintiff's agent and which recites that the vessel is "bound for Boston," and he thereupon sails at once for Boston, without waiting for a full cargo or the expiration of the lay days, the bill of lading is not conclusive evidence, in an action by the charterer against the owner to recover damages for the injury caused thereby, to show that the master was bound thus to sail at once directly for Boston, or that he exercised good faith in so doing; but if there is evidence tending to show the contrary, the question should be submitted to the jury. *Id.*

## SOLDIER.

1. Receiving state aid will not prevent a soldier from recovering any sum to which he may be entitled under the votes of the town in which he enlisted. *Grover v. Inhabitants of Pembroke*, 88.
2. A citizen of a town who enlisted in the military service of the United States after a promise of the town to pay a monthly sum to each citizen thereof who should so enlist had been terminated, under *St.* 1861, c. 222, § 2, by the lapse of ninety days, cannot maintain any action against the town to recover the bounty so voted. *Curtis v. Inhabitants of Pembroke*, 92.

See CONTRACT, 2-7; EMBEZZLEMENT.

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### SUBORNATION OF PERJURY.

1. An indictment for subornation of perjury in a deposition to be used in a civil action pending in another state, which alleges that on a certain day "a certain issue was then and there duly joined in the said suit" and that on the same day "a commission was duly issued" to take the deposition, sufficiently avers that issue was duly joined in the suit before the commission issued; and if, after a verdict of guilty, it appears by the bill of exceptions that evidence was introduced to show the pendency of the action, as alleged in the indictment, it will be presumed, in the absence of anything to show the contrary, that the evidence showed the pendency of an action in which issue had been duly joined. *Commonwealth v. Smith*, 243.
2. If it is averred in an indictment for subornation of perjury that it became a material question in the trial of the cause in which the perjury was alleged to have been committed whether the wife of the person alleged to have committed it had or had not, previously to his marriage with her, been living with the defendant as his mistress, and that the witness was asked, "Had she not been living with the defendant before you married her," to which he replied that she had not, evidence is competent to prove, for the purpose of establishing the perjury, that in fact she had lived with the defendant as his mistress *Id.*

2. Under the statutes of this commonwealth, one may be convicted of subornation of perjury who procures the commission of the perjury here through the agency of another guilty party, without the limits of Massachusetts. *Id.*

### SUPERIOR COURT.

See RECOGNIZANCE.

### SURVIVORSHIP OF ACTIONS.

See ACTION, 1.

### TAXES.

See CONSTITUTIONAL LAW, 1; PLEADING, 5.

### TENDER.

See PLEADING, 4.

### TOWN.

Under a statute providing that the profits of the alewife fisheries of a certain river should be paid into the treasuries of certain towns, in proportion to their respective valuations, the towns have no authority to vote to distribute the money on the polls. *Allen v. Inhabitants of Marion*, 108.

See DEED, 4.

### TRESPASS.

An action of tort in the nature of trespass *quare clausum fregit* is a personal action and may be commenced by trustee process, returnable in the county where the trustee lives, although that is not the county where the land is situated. *Way v. Dame*, 357.

See DAMAGES, 2; DOG; FIREWARD.

### TRUST.

1. A resulting trust in land in favor of a third person may be established by parol evidence, although the deed recites that the consideration was paid by the grantee, and it was in fact paid by him, provided that it was distinctly agreed before the purchase that the sum paid should be considered as a loan from the grantee to such third person; but the proof upon this point must be full and clear. *Kendall v. Mann*, 15.
2. If a conveyance of land is taken in the name of one who is but a nominal purchaser, and the purchase money comes from a married woman as agent of her husband, and the grantee named in the deed delivers to her a receipt for the money and a written promise to convey to her the estate on demand, and the estate is always treated by the parties as belonging to the husband, the grantee will hold the same in trust for the husband, and the facts creating such trust may be proved by parol evidence, and the grantee may discharge his trust after the husband has died intestate, by conveying the estate to his heirs.

at law. And the heirs of the wife, after her death, cannot maintain a bill in equity to compel a conveyance to them. And it is immaterial that one object of taking the conveyance in that form was to shield the estate from attachment by creditors of the husband. *Perkins v. Nichols*, 542.

2. A bill of sale of an undivided share of a vessel, absolute in form, to one who is named therein simply as trustee, without expressing the nature of the trust, but with an oral understanding that it is given as security for debts due and to become due from the vendor to a third party, with authority in the trustee, in case of default in the payment of any of said debts, to sell the share and apply the proceeds towards the payment thereof, rendering the surplus, if any, to the vendor, leaves no equity of redemption in the vendor. And if, on the return of the vessel from a whaling voyage on which she was engaged at the time of the execution of the bill of sale, a proportionate share of her catchings is set apart and afterwards sold for the trustee and *cestui que trust*, and the proceeds accounted for and afterwards applied so far as necessary by mutual agreement to pay for a proportionate share of the outfits for a new voyage, this is sufficient to show an agreement that a share of the catchings of the new voyage shall be held on the same trust with the share of the vessel, and the same may accordingly be sold by the trustee in the execution of his trust. *Munro v. Merchants' Bank*, 216.

#### TRUSTEE PROCESS.

If a debtor who has been arrested puts property into the hands of his bail to secure him for his liability on the bail bond, and the bail is then summoned as trustee in a trustee process brought against the debtor by another creditor, the plaintiff in such trustee process is entitled to have the liability of the trustee determined in that process, although it appears that the trustee has been sued on the bail bond. *Hooton v. Gamage*, 354.

See TRESPASS.

#### USAGE.

A merchandise broker can have no implied authority, from the usage of trade, to warrant goods sold by him to be of merchantable quality; and evidence to prove such usage is inadmissible; and a memorandum made by such broker of a contract for the sale of goods is invalid and inadmissible in evidence, if he has inserted therein, without express authority, a warranty by the seller that they are of merchantable quality. *Dodd v. Farlow*, 426.

#### WAREHOUSEMAN.

See COMMON CARRIER, 1.

#### WARRANT FOR TOWN-MEETING.

Under an article in a warrant for a town meeting "to see if the town will vote to appropriate a sum of money to aid the furnishing and equipment of

volunteer military companies to be enlisted in this town and vicinity, and to take any necessary measures for the support of the families of those who are ordered to service, and act on anything relating to the above objects," the town may vote to pay a certain sum monthly to each citizen of the town who shall enlist in the military service. *Grover v. Inhabitants of Pembroke*, 88.

### WAIVER.

See ABSENT DEFENDANT.

### WAY.

1. A rope stretched across a highway, above the ground, and attached at each end to objects which are outside of the limits of the highway, and in temporary use, is not a defect or want of repair in the highway for which a city is liable to a traveller who receives an injury from coming into collision with it, while it is in motion from human agency. *Barber v. Roxbury*, 318.
2. The selectmen of a town have authority to lay out a town way wholly upon land of citizens, against their consent, entering their land from a highway and returning to it at about the same place where it enters, and leading to no other way or landing-place, and capable of being used for no purposes of business or duty, or of access to the land of any other person; and which is laid out with the design to provide access not for the town merely, but for the public, to points or places in the lands of those citizens, esteemed as pleasing natural scenery. *Higginson v. Nahant*, 530.
3. The selectmen of a town may estimate the damages caused to the owner of land by the laying out of a town way at the same meeting at which the way is located. *Ib.*

### WILL.

1. It is not a sufficient attestation of a will for a subscribing witness to write his name in the absence of the testator, and in anticipation of the testator's signature, although he afterwards acknowledges it in the presence of the testator and of the other subscribing witnesses. *Chase v. Kittredge*, 49.
2. If a testator, after devising certain land to his brother, on condition of his paying to the residuary legatee a certain sum, makes his wife residuary legatee, and provides that her rights under the will shall not be affected by the birth of any child born to him before or after his decease, a child born before his decease cannot maintain an action to recover the whole or any portion of the land devised to the testator's brother. *Prentiss v. Prentiss*, 47.
3. If a testator devises to one person all his right, title and interest in certain real estate, which is subject to a right of dower and a mortgage given by himself to secure his promissory note, and, after various legacies of money, bequeaths to another person the residue of his personal estate, after the payment of all his just debts, legacies and charges against his estate, the mortgage debt is to be paid out of his personal estate, to the exoneration of the real estate. *Flimpton v. Fuller*, 139.

4. A devise to "surviving children, not knowing all their names, of my late sister A., they living in the state of Maine, to be divided equally between them all," will be construed to be a devise to all those children surviving at the date of the will; and if one of them afterwards dies, leaving issue, before the death of the testator, such issue will take the share of their deceased parent, under Gen. Sta. c. 92, § 28. *Morse v. Mason*, 36.
5. If the owner of a homestead purchases adjoining land which fronts upon an other street, and never occupies it himself as a part of his homestead, or uses it in any manner in connection therewith, or takes down the fence which separates it therefrom, but for many years and until his death lets it to tenants, it will not pass under a devise of his house lot; although he bought it for the purpose of having a passage from the other street to the back part of his house lot, and repeatedly said that he bought it for his personal use and for the benefit of his house lot and in order to annex it thereto. *Perkins v. Jewett*, 9.
6. A will, after directing the testator's debts and funeral expenses to be paid and giving legacies to his two sons, proceeded thus: "I give, devise and bequeath to my beloved wife, for her benefit and for the proper maintenance and education of my two daughters, all my personal property and all the real estate which may remain after the debts and expenses aforesaid and the legacies . . . shall have been paid, and the use, improvement and income thereof; to have and to hold the same so long as she shall remain my widow, or until her second marriage; but in case of her second marriage, when she shall have ceased to remain my widow, all the personal and real estate I hereby give, demise and bequeath to my wife aforesaid and to my two daughters, to be divided by them equally." *Held*, that by the true construction of the will the widow took the whole residue of the estate, after payment of the debts and specific legacies, in trust during widowhood; one third thereof in fee, and the other two thirds to hold during widowhood, with remainder in fee to the two daughters. *Smith v. Smith*, 423.

WITNESS.

1. The death of one of two joint defendants in an action of contract will not prevent the plaintiff from testifying in his own favor against the survivor. *Goss v. Austin*, 525.
2. In an action against an administrator to recover for money paid by the plaintiff as agent of the defendant's intestate, the plaintiff is not, under St. 1865, c. 307, a competent witness in his own favor. *Brown v. Brightman*, 226.







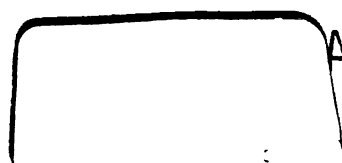




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